Supreme Court, U.S.
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No. 06-

In the Supreme Court of the United States

MOHAMMED HUSSAIN,

Petitioner,

v.

R. JAMES NICHOLSON, SECRETARY,
DEPARTMENT OF VETERAN'S AFFAIRS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Dawn V. Martin, Esquire
D.C. Federal Bar No. 412384
Law Offices of Dawn V. Martin
1090 Vermont Avenue, Suite 800
Washington, D.C. 20005
(202) 408-7040 telephone
(703) 642-0208 facsimile

Counsel for Petitioner

AMERICAN FINANCIAL PRINTERS • (202) 464-3500

QUESTIONS PRESENTED

1) Does this Court's recent decision in *Burlington v. White*, 126 S. Ct. 2405 (2006), compel reversal of the Court of Appeals' decision in *Hussain v. Nicholson*, 435 F. 3d 359 (2006), which defined an "adverse action," under the retaliation provision of Title VII of the Civil Rights Act of 1964, as a significant change in employment status, such as hiring, firing, failing to promote?

2) Do *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133 (2000) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) compel reversal of the Court of Appeals' decision, where the court accepted as fact the disputed assertions of the employer and ignored the plaintiff's evidence?

3) Does *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004), compel reversal of the Court of Appeals' decision in *Hussain*, holding that Dr. Hussain's claim did not meet the standards of a hostile work environment or constitute constructive discharge?

4) Does *Chandler v. Roudebush*, 425 U.S. 840 (1976), holding that district court proceedings are *de novo* proceedings which entitle a plaintiff to discovery in that forum, compel reversal of the Court of Appeals' denial of discovery, in part, because Dr. Hussain had begun discovery in his EEOC proceedings before filing suit?

5) Do *Conley v. Gibson*, 355 U.S. 41, 45-46, 47-48 (1957) and *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 298 (1968) and Fed. R. Civ. P. Rule 56(f) compel reversal of the Court of Appeals' grant of summary judgment to Defendant, based on factual affidavits of Defendant's agents, where plaintiff has been denied discovery necessary to rebut their factual allegations?

6) Did the Court of Appeals fail in its duty to review the decisions of the trial judge for bias, where the judge repeatedly referred to the Defendant as "the taxpayers" and "the public," ordered Dr. Hussain to pay the government's printing costs and liberally granted multiple extensions of time to the government, and accepted the government's motion for summary judgment late, without explanation, while denying Dr. Hussain's motion to extend discovery?

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U.S. Court of Appeals for the D.C. Circuit
Affirmance of District Court Decision

On January 31, 2006, the U.S. Court of Appeals for the D.C. Circuit affirmed the District Court's grant of summary judgment to the Defendant Veteran's Administration. *Hussain v. Nicholson*, 435 F. 3d 359 (D.C. Cir. 2006). Despite the affirmance, the Court of Appeals did acknowledge that Dr. Hussain had, in fact, presented evidence to rebut the Defendant's claims of performance deficiencies. The Appellate Court then determined that this fact was not material because, it held, Dr. Hussain had not proven that he was substantially more qualified than the selectees for the promotions that he sought. The Court did not address Dr. Hussain's evidence that he was not actually considered for either of the positions. The Court of Appeals also affirmed the district court's denial of Dr. Hussain's Rule 56(f) motion to enlarge discovery, although the Defendant did not file its Answer to the *Second Amended Complaint* until six days after it filed its late *Motion for Summary Judgment*, after numerous extensions.

U.S. District Court for the District of Columbia

On November 28, 2004, the U. S. District Court for the District of Columbia granted summary judgment to Defendant on Dr. Hussain's Title VII claims, *Hussain v. Principi*, 344 F. Supp. 2d 86 (D.D.C. 2004).

JURISDICTION

The judgment of the U.S. Court of Appeals for the D.C. Circuit was entered on January 31, 2006. (App. 1) The Court of Appeals denied rehearing *en banc* on April 19, 2006. (App. 18). This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS

See Addendum.

STATEMENT OF COUNSEL

This proceeding involves questions of exceptional national importance. Without supplemental guidance from this high Court, lower courts may inconsistently and indiscriminately grant so much deference to particular employers in hiring and promotion decisions, and inconsistently hold that certain retaliation claims do not rise to the level of "adverse actions," that Title VII plaintiffs will be routinely deprived of any meaningful opportunity to challenge illegal and abhorrent employment discrimination.

This case involves issues of the basic rights of discovery in litigation, extreme judicial bias and discrimination against law abiding Muslims U.S. citizens.

STATEMENT OF THE CASE

On February 24, 2003, Dr. Hussain filed this action, pursuant to Title VII of the Civil Rights Act of 1964, alleging employment discrimination on the basis of religion and national origin. The facts underlying his causes of action are discussed in Dr. Hussain's Appellate Brief ("HB") at 4-9, and the accompanying Joint Appendix ("JA"), at 754-764, 800-847), but are briefly summarized below.

Dr. Mohammed A. Hussain is dark skinned, fifty-eight year old male. He is a practicing Muslim, born in India and naturalized as a citizen of the United States. HB 4. In 1978, he joined the Veteran's Administration Medical Center (VAMC) as Assistant Chief of Radiation Therapy Services. HB 4. On June 25, 1997, Dr. Hussain's supervisor, Dr. Lunzar, retired. Dr. Hussain was appointed "Acting" Chief, with no assistant. For more than four years, Dr. Hussain performed all duties that both he and Dr. Lunzar previously shared. Dr. Hussain repeatedly asked for an assistant and to be promoted to the Chief position on a permanent basis.

On June 1, 1998, the hospital administrator, Mr. Garfunkel hired Dr. Klemens Barth, a White, non-Muslim male, to work in the radiology department as a contract employee. HB 6. Dr. Barth began supervising Dr. Hussain (HB 6), although, as an independent contractor, VA regulations prohibited him from supervising federal employees (*Id*). Dr. Barth was paid $200,000 to perform duties that Dr. Hussain had performed for four years, at a salary of $140,000. HB 6.

For the entire twenty-seven years of his service with the Veteran's Administration Medical Center ("VAMC"), Dr. Hussain was the only Asian, Indian or Muslim doctor in a managerial or supervisor position, within the Radiation and/or Oncology Departments, later merged as the Radiology Service Division. HB 5. Dr. Hussain was the only Muslim, of any rank, profession or position in the Radiation or Oncology Departments. (*Id.*) There were open religious tensions between various faiths and alliances among persons of the same faith, with Jewish-Catholic, Jewish-Muslim and Hindu-Muslim mini "holy wars" between doctors/administrators within this government hospital, evidenced by a "Jewish/Holocaust Society," anti-Muslim comments in staff meetings and office conversation, the Chief of Staff's portrait of the Pope in his office and the events leading to the removal of the Chief of Staff. HB 4-5.

On November 29, 2000, Dr. Hussain filed an internal EEO complaint with the Agency, alleging denial of the promotion to the permanent position of Chief of Radiation Therapy Services, on the basis of race, national origin, religion and age. HB 7. Immediately after Dr. Hussain's filed his EEOC charge, Dr. Hussain received his first negative evaluation in twenty-six years of service, rating him deficient *in all areas*. HB 7. Dr. Hussain had previously received "outstanding," "excellent" or "highly satisfactory" evaluations. HB 8.
In June of 2001, Dr. Barth hired Dr. Manning, an African-American, non-Muslim female, for the newly created

position of radiation therapy staff physician, purportedly providing Dr. Hussain with the assistant that he had been requesting for four years. HB 7. Dr. Hussain was completely excluded from the hiring process and was not permitted to supervise her. HB 7. Dr. Manning was paid a salary of $25,000 *more per year than her boss*, who had almost three decades of seniority over her. HB 8. On December 20, 2002, within a year and a half of hiring Dr. Manning as Dr. Hussain's assistant, Garfunkel, Fletcher and Barth appointed Dr. manning Chief of the Radiation Therapy Section, making her Dr. Hussain's boss. HB 8.

After his EEO complaint, the VA excessively monitored Dr. Hussain, denied his civil service rights, limited his clinical privileges, threatened his termination, denied him medical leave, and otherwise undermined and harassed him, creating a hostile work environment, ultimately resulting in his constructive discharge through forced retirement. (HB 8)

REASONS FOR GRANTING THE *WRIT*

First, *Hussain v. Nicholson*, 435 F. 3d 359 (D.C. Cir. 2006) incorrectly defines "adverse actions," within the meaning of Title VII of the Civil Rights Act, as recently defined by this Court in *Burlington v. White*, 126 S. Ct. 2405 (2006).

Second, *Hussain v. Nicholson* involves questions of national and even international importance. The Court of Appeals' decision overlooks evidence of pervasive and blatant religious alliances and biases, resulting in discrimination against Dr. Hussain, a law-abiding Muslim U.S. citizen, in his workplace, a U.S. government hospital.

As set forth in the *Amicus Curiae* brief submitted by the Council on American-Islamic Relations ("CAIR") in the U.S. Court of Appeals,[1] the Equal Employment Opportunity Commission (EEOC) reports that discrimination charges

[1] Unfortunately, CAIR's *Amicus Brief* was late filed and was not considered by the Court of Appeals.

from Muslims and people from large Islamic populations has increased, especially after the attacks on the World Trade Center and on the Pentagon. EEOC statistics reflect that 2,303 charges of discrimination against Muslims were filed from 9/11/2001 to 9/11/2004.[2] Those represent a more than 200 percent increase of charges since September 11, 2001.

In this case, the discrimination is being carried out by the United States government. The VA established a dominant religion, Judaism, in Dr. Hussain's workplace, in violation of the establishment clause of the First Amendment. Dr. Hussain, as the lone Muslim in this workplace, experienced discrimination and isolation, while the dominant religious groups vied for power. Where the U.S. government permits the establishment of one or more dominant religions in the workplace and denigrates other religions, the courts, and all civil rights advocates, must carefully examine the facts and eradicate the hostile work environment, maintained in the name of the American people. This case is an important one for Muslims, as well as for all people who seek to eradicate unlawful discrimination against law abiding Muslims peacefully practicing their faith in this country.

ARGUMENT

I. The Court of Appeals' Definition of "Adverse Action" Directly Conflicts with *Burlington v. White*

This Court's June 22, 2006 decision in *Burlington v. White*, 126 S. Ct. 2405 (2006), compels reversal of the Court of Appeals' decision in *Hussain v. Nicholson*, 435 F. 3d 359 (2006). *Burlington* redefined "adverse action," under Title

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[2] See page 8, § 2; of the Equal Employment Opportunity Commission's "*Fact Sheet: Backlash Employment Discrimination Charges since 9-11-2001, against individuals who are, or are perceived to be, Muslim, Arab, Afghani, Middle Eastern or South Asian.* The report does not exclusively focus on discrimination against Muslims but contains information about employment discrimination that is a post 9-11 backlash against Muslims and those who are perceived to be Muslim because they are from countries with large Islamic populations.

VII of the Civil Rights Act of 1964. *Burlington* distinguished the definition of "adverse action" where the plaintiff initially alleges *discrimination* – which must be in the context of an adverse employment action, and the definition of an actionable retaliation claim. The district court specifically rejected the definition of adverse action offered by Dr. Hussain, but adopted in *Burlington*.

> Plaintiff's claim that an adverse action is "any action reasonably likely to deter protected activity" is not the law in this Circuit.

344 F. Supp. 2d at 103, fn. 22, A- 49.

Burlington, held:

> ...the proper formulation requires a retaliation plaintiff to show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

126 S. Ct. at 2410.

The district court (344 F. Supp. 2d at 103, fn. 22, A- 49), also held that "[t]he legal standard for "adverse actions" is the same for a retaliation claim as for a discrimination claim;" but *Burlington* held:

> ... Title VII's substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions."

126 S. Ct. at 2414.

Burlington provided guidance in distinguishing actionable retaliation from mere "petty slights, minor annoyances, "snubbing by supervisors and co-workers" that take place at work and that "all employees experience." *Burlington*, 126 S. Ct. at 2415.

> The real social impact of workplace behavior often depends upon the constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used of the physical acts performed.

Burlington expressly adopted the standard for proving actionable retaliation set forth in *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006). 26 S. Ct. at 2411, 2413, 2415. *Rochon* expanded the definition of Title VII retaliation to include acts that are not even related to employment at all. The plaintiff FBI agent alleged that, in retaliation for his EEO complaint, the FBI failed to investigate a death threat against him and his wife. The D.C. Circuit expressly rejected the defendant government's argument that the plaintiff did not suffer an "adverse personnel action."

Rochon specifically adopted for Title VII the definition of adverse action set forth in *Passer v. American Chemical Society*, 935 F.2d 322 (D.C. Cir. 1991), an Age Discrimination in Employment Act (ADEA) case. *Passer* held that an employer had illegally retaliated against a *retired* employee when it cancelled a symposium to be held in his honor. *Id.* Even prior to *Rochon*, the D.C. Circuit had rejected, in certain cases, the definition of adverse action applied in *Hussain*. *Holcomb v. Powell*, 433 F.3d 889 (D.C.

Cir. 2006);[3] *Chappelle-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006). Dr. Hussain filed a motion for rehearing or for rehearing *en banc*, relying on these cases, as inconsistent with the decision in *Hussain*; however, the Court of Appeals denied the petition for rehearing. The continued inconsistencies and confusion, even within the D.C. Circuit that decided *Rochon*, highlight the need for clarification. *Hussain v. Nicholson* is a striking example of the continued misinterpretation of the new definition of adverse action, even within the Circuit praised by this Court in *Burlington* as having set the correct standard in *Rochon*.[4]

Dr. Hussain detailed fifteen acts[5] that the VA took against him, in retaliation ~~for his Title VII~~ charges of discrimination.

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[3] *Holcomb v. Powell*, 433 F.3d 889, was decided by a different panel of the same court two weeks before the decision in *Hussain*.

[4] *See* also *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (D.C.D. 1999), *reversed in part by Report and Recommendation of Magistrate Judge Facciola*, 2003 U.S. Dist. LEXIS 18501 (D.D.C. 2003) (adverse action restricted to ultimate, tangible employment actions such as firing, hiring or promotion, dismissing Plaintiff's claims of retaliatory conversion of position and withholding of vacant positions to prevent her consideration for them), *adopted* as Court Order, September 24, 2005. On November 21, 2005, Chief Judge Hogan reversed, in part, his September 24, 2005 Order and corrected the Magistrate's erroneous holding that breach of contract claim was dismissed in 1999 and that Plaintiff had not filed a Statement of Disputed Material Facts. On January 10, 2006 Order, Judge Hogan limited plaintiff's claims even beyond the magistrate's limitations, to rejection for one position on one date). Like the Court of Appeals in *Hussain*, the Chief Judge of the District Court refused to reconsider these claims under *Holcomb*, *Rochon*, or *Chappelle Johnson*. *See* March 6, 2006 Order, *denying Motion for Reconsideration, based on Holcomb, denied*; March 30, 2006 Order, *clarifying that Plaintiff's retaliation claims include her rejections for any faculty position in December of 1997 and April of 1998*; March 31, 2006 Order *denying Motion for Reconsideration, based on Rochon* (after denying Plaintiff's Motion to Supplement *Rochon* Motion with discussion of *Chappelle-Johnson*, decided March 17, 2006). Post trial motions for judgment addressing these and other issues, are pending.

[5] The court lists only twelve acts. 435 F. 3d at 366 (App. 11).

Dr. Hussain alleged that each act constituted an individual act of retaliation. In addition, he alleged that together, they created a hostile work environment, resulting in his constructive discharge. *Hussain's Opposition to Defendant's Motion for Summary Judgment* ("OMSJ") at JA 776-787; discussed in HB 27, 42-47 and RB 9.

These acts included: 1) rejection for promotion; 2) demotion; 3) sudden poor performance evaluations; 4) report to the National Malpractice Data Bank;[6] 5) denial of union representation; 6) threats of termination; 7) fostering insubordination toward Dr. Hussain, at the risk of endangering patient safety; 8) excessive monitoring; 9) restriction on clinical privileges; 10) denial of medical leave/AWOL placement; 11) withholding of retirement papers necessary to timely obtain retirement income; 12) denial of counsel and failure to provide retirement options in writing; 13) denial of access to personnel file; 14) delay of special pay; and 15) constructive discharge.

The Court of Appeals concluded that none of the enumerated acts of retaliation constituted adverse actions under Title VII, except his rejection for promotions, the *denial* of his clinical privileges,[7] special pay and medical leave[8] because the other

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[6] Dr. Hussain was the only doctor reported, although at least twenty (25) doctors treated the patient in question, including Dr. Fletcher. JA 780-781. Dr. Hussain was *not* found liable for malpractice. JA 18.

[7] The Court of Appeals stated that Dr. Hussain "exaggerate[d]" the VA's retaliatory actions because his clinical privileges were not *denied* 435 F. 3d at 367 (A-12); however, Dr. Hussain actually alleged that his privileges were temporarily suspended and then restricted. RB 7-8. *Burlington* held that suspensions are adverse actions. 126 S. Ct. at 2408. The Court of Appeals acknowledged that Drs. Barth and Manning denied Dr. Hussain the normal two year renewal of his clinical privileges and subjected him to monthly reviews. 435 F. 3d at 362 (A-4). In concluding that "the record clearly shows" that Dr. Hussain exaggerated the facts (435 F. 3d at 366-367, A-12), the Court of Appeals did not cite the evidence of record, but instead, only cited the district court opinion, which misstated the facts, which was one of the reasons for the appeal.

acts did not result in immediate losses of money or other tangible employment benefits. *Hussain*, 435 F. 3d at 366.

Under *Burlington*, the enumerated acts that the Court of Appeals deemed not to be adverse actions within the meaning of Title VII are now actionable. These actions include Dr. Hussain's: 1) demotion; 2) sudden poor performance evaluations; 3) report to the National Malpractice Data Bank; 4) denial of union representation; 5) threats of termination; 6) fostering insubordination toward Dr. Hussain, at the risk of endangering patient safety; 7) excessive monitoring; 8) suspension/restriction of clinical privileges; 9) withholding of retirement/disability retirement papers necessary to timely obtain retirement income; 10) denial of counsel and failure to provide retirement options in writing; and 11) denial of access to personnel file.

The Court of Appeals' holding that "excessive monitoring" and suspended clinical privileges are not adverse actions directly conflicts with *Burlington*. *Burlington* upheld the plaintiff's claims, which included "daily" monitoring of her activities (126 S. Ct. at 2409) and retaliatory suspension, even though she was eventually reinstated, with back pay. 126 S. Ct. at 2408. As this Court held in *Burlington*, even when an adverse action is remedied, such as a suspension that was later revoked, there is compensable harm, since the

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Dr. Hussain rebutted each one of the VA's purported reasons for his rejection. RB 7-20.

[8] The Court of Appeals stated that Dr. Hussain "failed to provide medical documentation to support his absence" (435 F. 3d at 362, A-4); however, he had provided the medical reports of his medical physician and his psychiatrist, both of whom advised that he take medical leave, based on their assessment that job-related stress was exacerbating Dr. Hussain's deteriorating health. (HB 47-48) Even the district court acknowledged that Dr. Hussain provided medical documentation. 344 F. Supp. 2d 86 (A-26) Dr. Manning demanded additional medical documentation, but never specified how Dr. Hussain could possibly provide medical documentation beyond what he had already provided. *Id.*

lost income, even if restored, created hardship at the time of the adverse action. *Burlington*, 126 S. Ct. at 2408.

II. The Court of Appeals Erroneously Held that Dr. Hussain did not Argue or Establish a Causal Connection between the Protected Activity and the Adverse Action

In order to establish a prima facie case of retaliation, Plaintiff must show that: (1) he was engaged in protected activity under Title VII; (2) he was subjected to adverse employment action;[9] and (3) a causal connection exists between the protected activity and the adverse action. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, (1973). Where the adverse treatment closely follows the protected activity, Plaintiff has established a *prima facie* case of retaliation. *Cones v. Shalala*, 199 F.3d 512, 520 (D.C. Cir. 2000); *Brown v. Brody*, 199 F.3d 446, 452-53 (D.C. Cir. 1999). When an adverse treatment occurs "on the heels of" the protected activity, a *prima facie* case is established. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516, at *18, (D.D.C. 1999) (non-renewal of law professor's contract, less than one month after professor first reported sexual harassment/stalking by a delusional, homeless stranger on campus and the same day as her last complaint).

The Court of Appeals affirmed the district court's determination that Dr. Hussain provided insufficient evidence of a causal connection between the alleged adverse action and his protected activity (435 F. 3d at 366, A-11); however, Dr. Hussain discussed, at length, the causal connection between his protected activity and the adverse actions (HB at 34-48), ending the discussion as follows:

> Dr. Hussain engaged in a protected activity when he filed his internal EEO complaint on February 14, 2001. Immediately after he filed his EEOC charge, and continuing until his forced retirement, in 2003,

[9] This criterion has been modified by *Burlington*.

the Agency engaged in a series of retaliatory acts that created such a hostile work environment for Dr. Hussain that he was forced to retire. *See OMSJ*, at 22-45.

III. The Court of Appeals Failed to Apply this Court's Decision in *Pennsylvania State Police v. Suders* to Assess the Severity of Dr. Hussain's Hostile Work Environment

Where an employee resigns because the working conditions have become so intolerable that a reasonable person in the employee's position would have felt compelled to resign, the employee has been constructively discharged and may seek the same remedy that he/she could have sought if discharged. *Pennsylvania State Police v. Suders*, 542 U.S. 2342, 2351, 2354 (2004). (HB 44-48.) The hostile work environment created by the VA forced Dr. Hussain to retire, constructively discharging him.

The Court of Appeals ignored direct evidence of constructive discharge. Dr. Hussain testified that Dr. Barth told him that, if he did not retire, the VA would "put him in a box." (JA 782) Whether this was meant to indicate isolation from his supervisors and colleagues, or a "coffin," in light of Dr. Hussain's stress related illnesses, for which he was seeking the medical leave, these words would have a tremendous impact of any employee, particularly a doctor treating cancer patients, who must rely on assistants and colleagues to assist with matters involving patient health and safety.

The Court of Appeals acknowledged the claim of hostile work environment based on retaliation, citing *Singletary v. District of Columbia*, 351 F.3d 519, 526 (D.C. Cir. 2003) (435 F. 3d at 366);[10] however, it ignored Dr. Hussain's reliance on *Evans v. Principi*, 2005 U.S. Dist. LEXIS 3571

[10] The district court refused to even consider whether the conditions were intolerable, recognizing no evidence of discrimination based on race, religion or national origin. (HB 48)

(D.D.C. 2005). RB 24-25. In *Evans*, the same Defendant in the present case -- the VA -- was denied summary judgment based on evidence that would allow a jury to conclude that the hospital had created a hostile work environment for the plaintiff, a male nurse.

> Plaintiff claims that Jackson, among other things, (1) "immediately demonstrated strong disdain and hatred for him as the only male nurse in the unit," Pl.'s Mot. at 1; (2) "verbally disciplined him falsely, berated him, made false accusations against him, screamed and yelled at him openly and frequently; [and] told him at least twice a week for over two years that he did not fit in and [that] he should quit, [that] he was not wanted there and [that he] should not have been there in the first place," id.; (3) "segregated him from herself and other female nurses," id.; (4) "chastised him for what she allowed other female nurses to get away with," id. at 2; (5) conducted a more detailed audit of Plaintiff's work than of any of the other female nurses, see id.; and (6) "refused to interview him and another highly experienced male nurse for the Community Nurse position they [were] qualified for and told [him] and the other male applicant that she had preselected a female nurse for the position." Id. Thus, it is clear that a reasonable juror could conclude, by a preponderance of the evidence, that the conduct Plaintiff alleges gave rise to a hostile work environment.

2005 U.S. Dist. LEXIS 3571.

The acts that the VA committed against nurse Evans are strikingly similar to those that it took against Dr. Hussain. The VA: (1) demonstrated disdain and disrespect for Dr. Hussain, as the only Muslim functioning as Chief of a Division; (2) disciplined and falsely accused Dr. Hussain of

misconduct and/or incompetence; (3) undermined Dr. Hussain's authority with subordinates; (4) separated Dr. Hussain from his colleagues by hiring new doctors and pitting them against him, as competitors (Drs. Barth and Manning); (5) chastised Dr. Hussain, instead of subordinates, when they failed to follow his instructions, even where patient health and safety were in jeopardy; (6) excessively and discriminatorily monitored Dr. Hussain's work; (7) restricted Dr. Hussain's hospital privileges; (8) refused to consider Dr. Hussain to permanently fill the Chief position; and (9) pre-selected non-Muslims, Drs. Barth and Manning, to promote over Dr. Hussain, leaving him no opportunity to compete for the position that he had been filling for four and a half years, on an "Acting" basis.

The decisions in *Evans* and *Hussain*, against the very same hospital for similar acts, are strikingly inconsistent, inequitable and unjust. Dr. Hussain's case of hostile work environment is even stronger than that of nurse Evans. The VA jeopardized patient safety and health along with Dr. Hussain's medical license, hospital privileges and credentials. He was intimidated daily by hospital officials and even denied medical leave, leaving him without an income to support his family while he was physically sick from work-related stress. No reasonable doctor could be expected to work under these conditions.

IV. The Court of Appeals Overlooked Dr. Hussain's Superior Qualifications to those of Dr. Manning

Drs. Fletcher and Barth promoted Dr. Manning over Dr. Hussain, to be his supervisor, as the permanent Chief of Radiation Therapy. The Appellate Court never assessed Dr. Manning's credentials as compared to those of Dr. Hussain. A jury could certainly find that Dr. Hussain was significantly more qualified for the Chief of the Radiation Therapy Service than was Dr. Manning. Dr. Hussain had 26 years of experience in the Radiation Therapy Service and performed

the job of Chief of the Division for 4 ½ years. He had specialized skill in brachytherapy and implemented it at the VA.[11] He had residencies in, and was Board certified in both Diagnostic Radiology and Therapeutic Radiology.[12] He had publications and was a faculty member at Georgetown and Howard Medical Schools. He performed dedicated, consuming service to the Agency, under what even Dr. Barth deemed "unbearable" conditions, working "on call" 24 hours per day, 7 days per week, 365 days per year, for four and a half years, with no assistant. (HB at 46-47)

Dr. Hussain was *never considered* for the position of permanent Chief of the Radiation Therapy Service – whether the "competition" was Dr. Manning, or *no one at all*. HB 6, 20, 23-25, 34. Mr. Garfunkel and Dr. Fletcher – who founded the "Holocaust Society" at the VAMC -- were determined not to allow an Indian Muslim to join their ranks of Division Chief. The Court of Appeals overlooked the Supreme Court law interpreting Fed. R. Civ. P. 56(c), requiring that, for purposes of motions to summary judgment, "the evidence of the non-movant is to be believed and all justifiable inferences drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Mastro v. Potomic Electric Power Company*, 447 F.3d 843, 855 (2006); *Holcomb v. Powell*, 433 F.3d at 896, quoting *Latham v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003).

In assessing motions for summary judgment, courts are to consider a combination of 1) evidence establishing the plaintiff's *prima facie* case; 2) evidence the plaintiff presents to attach the employer's proffered reasons for its actions; and 3) any further evidence of discrimination that may be available to the plaintiff, such as independent evidence of

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[11] Dr. Hussain had trained Dr. Manning in this specialized prostate cancer treatment, but she had never performed one.

[12] Neither Dr. Manning nor Dr. Barth was certified in both Diagnostic Radiology and Therapeutic Radiology. (HB 35).

discriminatory statements or attitudes on the part of the employer. *Mastro v. Potomic Electric Power Company*, 447 F.3d at 855; *Id., Aka v. Washington Hospital Center*, 156 F3d, 1284, 1289 (D.C. Cir. 1998) (*en banc*).

The district court usurped the province of the jury and concluded, contrary to the evidence, that Drs. Barth and Manning were more qualified for the position of Chief of the Radiation Therapy Service and the merged Division, respectively, than was Dr. Hussain. The VA's purported conclusion that Drs. Barth and Manning were more qualified than Dr. Hussain was specifically based on the VA's false accusation that Dr. Hussain had the performance deficiencies that disqualified him from management positions. The Court of Appeals, though acknowledging the evidence ignored by the district court, did not correct the district court's erroneous holding based on its disregard of that evidence.

Although the jury could ultimately credit the version of the facts, as stated by Drs. Manning and Barth, "this is not a basis upon which a court may rest in granting a motion for summary judgment." *Mastro v. Potomic Electric Power Company*, 447 F.3d at 850, citing *George v. Leavitt*, 407 F.3d 405, 413 (D.C. Cir. 2005). The jury must assess credibility where either the plaintiff's or the defendant's version of events could be believed by reasonable jurors.

V. The Court of Appeals Violated the Mandate of *Anderson v. Liberty Lobby, Inc.* and *Reeves v. Sanderson*, Ignoring Evidence Rebutting the Employer's Purported Reasons for the Adverse Actions

In order to defeat a motion for summary judgment, the non-moving party must not just *articulate* a defense, but actually produce evidence that create a "genuine" issue of material fact that could arguably prove the facts alleged and result in a verdict for the non-movant. *Reeves v. Sanderson*, 530 U.S. 133, 142 (2000) and *Lathram v. Snow*, 336 F.3d at 1088;

Holcomb, 433 F.3d 889 at 895. The evidence of record exposes the VA's assertions as pure fabrications.

The Court of Appeals overlooked *Platero v. Williams*, 2004 U.S. App. LEXIS 10473 (10th Cir. 2004), relied on by Dr. Hussain (HB 17, RB 4-5), holding that a sudden decrease in performance evaluations is evidence that the stated deficiencies are pre-textual. Dr. Hussain had a 26 year history of performance evaluations that conflict with the contested performance evaluations, entitling him to survive summary judgment.

> A plaintiff attacking a qualifications-based explanation is of course not limited to comparing his qualifications against those of the successful candidate. The plaintiff can instead seek to expose other flaws in the employer's explanation. For example, the plaintiff can attempt to show that the employer's explanation was **fabricated, after the fact**, by showing that it contradicts other contemporaneous accounts of the employer's decision. Or a plaintiff can attempt to show that the employer's explanation misstates the candidates' qualifications.... Adequate evidence of this type may suffice to permit a jury to infer that the employer's explanation is incorrect or fabricated, and thus to infer discrimination. (Emphasis added)

Aka 156 F.3d at 1295, cited in *Holcomb*, 433 F.3d at 897.

The district court erroneously accepted, at face value, the VA's unsubstantiated statements regarding these alleged deficiencies, in total disregard of Dr. Hussain's evidence. The Court of Appeals specifically acknowledged that Dr. Hussain presented evidence indicating that the VA misrepresented his credentials and falsely accused of him certain deficiencies.

> Hussain contends that the district court erroneously discounted evidence of his own qualifications, including his special skill in implementing brachytherapy, his involvement in charitable work and professional committees, and his faculty position at Georgetown University. He also points to various documents which contradict the hospital's claim that he failed to hire necessary staff, correct personnel problems, and request important equipment. But even viewed in the light most favorable to Hussain, this evidence merely shows that Hussain was a better candidate than the hospital admits, not that he was more qualified than Barth.

435 F. 3d at 365.

Where the decision-maker is demonstrated to have lied about the reasons for the plaintiff's non-renewal, there is "a strong inference of discriminatory intent." *Aka*, 156 F.3d at 1298.

> [A] lie is evidence of consciousness of guilt. The jury can conclude that an employer who fabricates a false explanation has something to hide; that 'something' may well be discriminatory intent.

Aka, 156 F.3d at 1293.

The VA argued that Dr. Manning was a better "manager" than Dr. Hussain, but the only evidence it presented in support of this assertion was Dr. Manning's own opinion of herself! In addition to the obvious bias that Dr. Manning has in assessing herself a better manager than Dr. Hussain, the VA's reliance on such vague, subjective purported standards are always suspect.

> ... courts traditionally treat explanations that rely heavily on subjective considerations with caution.

> Particularly in cases where a jury could reasonably find that the plaintiff was otherwise significantly more qualified than the successful applicant, an employer's asserted strong reliance on subjective feelings about the candidates may mask discrimination... an employer's heavy use of "highly subjective" criteria, such as "interpersonal skills," could support an inference of discrimination.

Aka, 156 F.3d at 1298.

Though recognizing the district court's error, the Court of Appeals did not correct it by allowing Dr. Hussain to present the VA's "lies" and misrepresentations to a jury.

VI. The Court of Appeals Failed to Acknowledge that Discriminatory Animus is Evidenced by "Attitudes" Harbored by the Alleged Discriminating Officials

Where the alleged discriminating official has made statements that indicate discriminatory animus, or other "attitudes" suggesting that the alleged discriminator harbors discriminatory attitudes for a prohibited reason, these statements constitute evidence of discriminatory motive. *Holcomb*, 433 F.3d at 901, citing *Dunaway v. International Brotherhood of Teamsters*, 310 F.3d 758 (D.C. Cir. 2002).

The Court of Appeals characterized Barth's and Manning's uncorroborated conclusory statements as facts "observed," or presumed true, while discrediting Dr. Hussain's "observations" of factual occurrences as "conclusory" statements, unsupported by the record.[13] 435 F. 3d at 365

[13] The district court dismissed Dr. Hussain's affidavit statements recounting anti-Muslim comments in the workplace as "hearsay" (344 F. Supp. 2d at 100, A-41); but he personally heard the hospital officials make the anti-Muslim, pro-Israel/Jewish comments, observed the annual Holocaust symposia on the hospital's premises, the portrait of the Pope on Dr. Spagnolo's office wall, and received the memo seeking to remove

(A-10). The Court of Appeals overlooked the very circumstances and context of the alleged discrimination and retaliation that *Aka* and *Holcomb* specifically held were highly relevant to motive.

VII. The Court of Appeals Failed to Address the VA's Refusal to Promote Dr. Hussain for Over Four Years

The VA did not reject Dr. Hussain in favor of a more "qualified" candidate. For four years after Dr. Lunzar's retirement, Dr. Hussain's only "competition" for the position of Chief was *an empty chair*. He was simply never considered for the position. He tirelessly performed the duties of the Chief, as "Acting" Chief, for four years – violating federal regulations prohibiting "Acting" positions from lasting more than 90 days. HB 6, 24; RB 9. Not only did the VA refuse to afford him the title, salary and respect of the position that he was performing, but it refused him funds to hire another doctor, leaving him to run the department by himself. HB 7-9.

The VA found no one qualified to perform the duties performed by Dr. Hussain. After three years of leaving him "Acting," the VA hired Dr. Barth to work in a related position to study Dr. Hussain and attempt to learn how to perform his job. Even then, Dr. Barth did not have the appropriate background to perform Dr. Hussain's duties.

On February 14, 2001, Dr. Hussain filed the first EEO charge of his life, alleging, *inter alia*, that the leadership of the hospital was entirely White, male and non-Muslim. Dr. Fletcher finally funded a second doctor's position in the Radiation Therapy Service, and instructed Dr. Barth to recruit this purported "assistant" for Dr. Hussain – but with no input from Dr. Hussain whatsoever. As a result of Dr. Hussain's charge, Drs. Barth and Fletcher recognized that

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Dr. Spagnolo from the hospital. HB 5, 13, 22, 40. Dr. Patel, a Hindu, openly stated his anti-Muslim sentiments. HB 14-15.

they needed to "integrate" the hospital leadership from its White male only status; consequently, they only considered African-American candidates for the position. Dr. Barth selected Dr. Manning, a non-Muslim African-American woman. Dr. Barth immediately enlisted his new hire to undermine her supervisor and replace him. Dr. Hussain was forced to train his own purported "assistant" to replace him.

VIII. **The Court of Appeals Overlooked Evidence that the "Merger" was Pretext for Replacing Dr. Hussain**

The Court of Appeals' conclusion that Dr. Barth was selected over Dr. Hussain as the Chief of the new Radiology Division because he was more qualified for it overlooks the striking admission of the VA: "the position was never advertised and Dr. Hussain most assuredly was not considered for the post." JA 769, 133-134. The divisions never actually "merged." (HB 25-26, 32) The Court of Appeals correctly observed that Dr. Hussain's duties were unchanged after the purported "merger." 435 F. 3d at 362 (A-3). Dr. Barth never actually supervised the Radiation Therapy Service or had anything to do with the day to day operations of the Service. The Radiation Therapy Service and the Imaging Service continued to have different budgets, different staffs, different equipment, and to run completely independently of each other. HB 769-770. The "merger" consisted only of *Dr. Barth's name being placed in two different places on an organizational chart*, such that *he was listed as his own supervisor*! HB 25-26. There was no "merger;" there was only a pre-textual chart to justify Dr. Barth, rather than Dr. Hussain, recruiting and hiring the "assistant" that would become Dr. Hussain's replacement as Chief of the Radiation Therapy Service.

IX. The Court of Appeals Had a Duty to Review the Denial of Dr. Hussain's Rule 56(f) Motion

This Court has cautioned lower courts not to deprive a Plaintiff of his/her day in Court without any opportunity to

conduct discovery or otherwise discover the specific evidence that is held in the guarded possession of the Defendant. *Conley v. Gibson*, 355 U.S. 41, 45-46, 47-48 (1957). Pursuant to Fed. R. Civ. P. 56(f), a court may defer ruling on a summary judgment motion and permit further discovery so that the nonmoving party may obtain the information necessary to show an issue of material fact in dispute. The affidavit is required to ensure that the nonmoving party is invoking Rule 56(f) in good faith. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. at 298; *First Chicago International, v. United Exchange Co., Ltd*, 836 F.2d at 1380; *Pfeil v. Rogers*, 757 F.2d 850, 856 (7th Cir. 1985).

In *Chappelle-Johnson v. Powell*, 440 F.3d 484, a different panel of the D.C. Circuit than the panel deciding *Hussain* reversed the district court's denial of the plaintiff's Rule 56(f) motion to enlarge discovery to oppose a summary judgment motion. *Chappelle-Johnson* held that there is no distinction between a *de novo* review and an abuse of discretion review where a court has denied a Rule 56(f) motion in contradiction to the law. A district court by definition abuses its discretion by making an error of law.

In *Hussain*, the district judge held that Dr. Hussain's Rule 56(f) motion was "remarkable" since there was a pending motion for summary judgment (JA 724 lines 21-23); however, *Rule 56(f) only applies where there is a motion for summary judgment pending*. A Rule 56(f) motion informs the court that the responding party needs additional discovery to respond to a pending motion for summary judgment. It is clearly an error of law to deny a motion as "remarkable" when it was filed just when and as the Rules provide. The Court of Appeals should have reversed it, whether as an error of law or an abuse of discretion.

Even under Fed. Civ. R. P. 15, as explained in *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 401 (1990); *Atchinson v. District of Columbia*, 73 F.3d 418, 424 (D.C. Cir. 1996) (HB 49), under an abuse of discretion standard, the district court is required to fairly exercise discretion as to whether to allow a party to file out of time, taking into account the needs and due diligence of the parties, the practicalities of obtaining evidence, the harm, surprise or unfairness to either party, and in the interests of justice. *Accord, Canady v. Erbe Elektromedizin GmbH*, 307 F. Supp. 2d 2 (D.D.C. 2004).

Dr. Hussain argued, *inter alia*, that a party normally waits until the opposing party files his or her Answer to the Complaint before conducting discovery, citing *United States v. American Tel. and Tel. Co.*, 461 F. Supp. 1314, 1347, 1349 (D.D.C. 1978). The VA filed it *six days* after it filed its *Answer to the Amended Complaint*. Dr. Hussain should have been permitted discovery after receiving the *Answer*.

The court acknowledged that Dr. Hussain's new counsel, Ms. Martin, was inheriting a case in "perhaps" "an extremely prejudiced state." JA 738 lines 16-21. The judge noted that the denial of discovery may seem "very harsh" to Dr. Hussain (JA 732 lines 24-25) and that "unfortunately, the client does suffer when the lawyer falls down on the job" (JA 734 lines 12-13); however, the judge did not similarly apply the Rules "harsh[ly]" to the Agency.

The Appellate Court completely deferred to district court's discretion, failing to review for errors of law, abuse of discretion, bias and different standards applied to the parties. Providing Dr. Hussain with his basic right to discovery would have caused no undue harm, surprise or unfairness to the government. It was the government *itself* that delayed the litigation with repeated filing extensions and late filing. Justice required granting Dr. Hussain's motion.

The Appellate Court erroneously stated that Dr. Hussain failed to raise a Rule 56(f) argument for an enlargement of time at the trial court level (435 F. 3d at 364); however, the record clearly reflects that Dr. Hussain *did* raise a Rule 56(f) argument at the district court level -- at every opportunity. First, in Dr. Hussain's July 10, 2004 *Motion to Reopen Discovery*, (JA 696-704),[14] relied on Fed. R. Civ. P. 56(f), with extensive citations to case law interpreting Rule 56 provisions, particularly Rule 56(f).

Second, during the July 22, 2004 hearing, Dr. Hussain's counsel, Ms. Martin, expressly stated that she intended to file a Rule 56(f) affidavit with Dr. Hussain's *Opposition to Defendant's Motion for Summary Judgment*; however, the judge expressly prohibited her from filing a Rule 56(f) affidavit and expressly denied the Rule 56(f) motion. HB 11.

Third, Dr. Hussain raised his Rule 56(f) argument one last time before the trial court, in his *Opposition to Defendant's Motion for Summary Judgment*, JA 790-798; HB 11.[15] Dr. Hussain expressly stated, in his *Opposition*, that it did not include a Rule 56(f) affidavit because "the Court specifically ordered Plaintiff's counsel not to include such an affidavit or a request to reopen or enlarge discovery," citing and attaching the transcript of the hearing. JA 792, fn. 4; HB 11. The Court of Appeals ignored the clear record of Dr. Hussain's Rule 56(f) arguments at the district court level.

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[14] Although Ms. Martin drafted and signed Dr. Hussain's *Motion to Enlarge Discovery*, the district court ordered her to "sit down" (HB 54; JA 719 line 19 through JA 720 line 3) and would not allow her to argue the motion. The judge required Mr. Shaw -- whom she openly deemed incompetent -- to argue it. (JA 737 line 12)

[15] The Court of Appeals stated that Dr. Hussain notified the district court that Martin had replaced Mr. Shaw when she entered her Notice of Appearance (435 F. 3d at 363, A-5), but she had actually joined him as co-counsel. The judge ordered Mr. Shaw to withdraw from the case and said that she would hold Ms. Martin responsible for the *Opposition*, if she elected to remain in the case.

despite his citations to it. Dr. Hussain was entitled to have his Rule 56(f) motion reviewed by the Appellate Court for an abuse of discretion and/or error of law.

The concurring opinion's conclusion that Dr. Hussain was not actually prejudiced by being denied the right to depose Dr. Manning or Dr. Patel because "neither was a central figure in Hussain's discrimination or retaliation claims" (435 F. 3d at 369, A-17) is completely contradicted by the record and even both lower court decisions. Dr. Manning is a certainly a *central figure* in this litigation. The Court of Appeals acknowledged that Dr. Manning was Dr. Hussain's direct supervisor, that she denied his request for medical leave, and that she recommended restricting his clinical privileges. 435 F. 3d at 362, A-4. Dr. Manning's decision resulted in Dr. Hussain's AWOL and ultimate constructive discharge. The Court relied on Dr. Manning's own opinion of herself as more qualified than Dr. Hussain for the position that Dr. Hussain had filled for four and a half years before she was selected. 435 F. 3d at 369, A-17.

The VA relied heavily on the affidavit of physicist (not a medical doctor), Dr. Patel, to denigrate Dr. Hussain as a manager and a doctor. RB 13-14. Particularly in light of VA's clear false statements regarding Dr. Hussain's performance, relying on the affidavits of Drs. Manning, Barth and Patel, Dr. Hussain is entitled to discovery and to proceed to a jury on the questions of whether these false statements regarding "deficiencies" in performance were a pre-text, or "cover up" for retaliation. Dr. Hussain was also not permitted to depose Drs. Krasnow or Finkelstein, two of the doctors who participated in adverse actions against him. These doctors also openly criticized Muslim Palestinians with respect to their conflict with Israel and the Jewish faith, demonstrating religious animus.

X. The Court of Appeals Failed to Address the District Judge's Biased References to the Government and Preferential Treatment of the Government

A. The District Judge Referred to the Government as the "Taxpayers" and the "Public" and Ordered Dr. Hussain to Pay its Printing Costs

The Court of Appeals did not consider the district judge's bias in assessing abuse of discretion in denying Dr. Hussain's enlarged discovery. The district judge repeatedly referred to the Agency as "the public and "the taxpayers." She expressed concern for any costs expended by the U.S. government in litigating this case, even for printing out electronically filed exhibits. HB 59-60. The district judge inappropriately *added to* the incredible financial burden carried by Dr. Hussain, a retired U.S. government employee and a U.S. taxpayer himself, to challenge the destruction of his 27 year career as a dedicated oncologist.

The trial judge's conduct and comments imply that she would have viewed any award in favor Dr. Hussain as an imposition upon the "taxpayers." The judge's reference to the VA as "the public" implied that she somehow viewed Dr. Hussain as an adversary, *or enemy*, of the public at large. The district judge "short-cut" the judicial process to "save" "the taxpayers" any money that a jury might be award to Dr. Hussain or that the government would expend in order to continue this case. The court deprived Dr. Hussain of due process and his right to adjudicate his claims on the merits.

B. The District Court Demonstrated Bias in Applying Rules, Orders and Standards

The district judge said that the government would be harmed if discovery were reopened because "the public" had paid to file its *Motion for Summary Judgment* ("*MSJ*"). (JA 721 lines 2-3; JA 738 lines 4-11) This cannot be a valid reason for the denial, since Rule 56(f) specifically anticipates discovery being re-opened after a party has filed a motion for

summary judgment. Moreover, because of electronic filing, the out of pocket filing costs to the public were "zero." (JA 794, *OMSJ* at 41) The Agency did not waste time drafting the *MJS* because it would still have been pending when discovery ended. The Agency could have supplemented it after discovery at its option. *Id.*

The district court liberally granted the Agency enlargements of time, allowing it, without excuse or explanation, to file is *Answer* to the *Second Amended Complain* five months late. HB 53. The VA filed its *MSJ* two months beyond the original Scheduling Order. *Id.* Where the court held the Agency to so lax a standard of meeting the "good cause" requirement for three enlargements of time, the same liberal standard should have been applied to Dr. Hussain's request for an enlargement of discovery. The trial court abused its discretion by stringently holding Dr. Hussain – but not the Agency -- to the time limits of the original Scheduling Order.

C. The District Court Erroneously Held that Dr. Hussain had an Administrative Hearing[16]

The district court attempted to diminish the impact of denying Dr. Hussain's motion to extend discovery by claiming that that Dr. Hussain "had an administrative hearing" (JA 724 lines 9:21); however, *Dr. Hussain has never had any hearing in any forum on the merits of his case.* The court stated that Dr. Hussain had "an opportunity to obtain discovery at the administrative level." (JA 736-737, Novemb[illegible] 28, 2004 Order) Again, the Court's conclusion is incorrect. In the EEOC proceedings, the Agency violated

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[16] The Court mistakenly concluded that "Tony Shaw ... took several depositions in connection with proceedings before the EEOC." (*Hussain*, 435 F.3d at 362). At the EEOC, Dr. Hussain was represented by Frederic Brandes, who initiated the litigation in Federal Court. (See Complaint, J.A. 9, 29, *Opposition to Motion to Dismiss*, 56. After his tort claims were dismissed for failure to comply with the Federal Torts Claims Act, Dr. Hussain terminated Mr. Brandes and hired Mr. Shaw. JA 34.

several orders by the Administrative Judge to produce discovery and witnesses for depositions. (JA 791; *OMSJ* at 38; JA 737 lines 8-9) When the Administrative Judge took an indefinite leave of absence in the midst of the discovery dispute, Dr. Hussain abandoned the administrative process with the expectation that he would be able to conduct discovery in his federal litigation, which constitute *de novo* proceedings. *Chandler v. Roudebush*, 425 U.S. 840 (1976) (JA 791, *OMSJ* at 3, 9).

The Agency represented that its *MSJ* was based upon evidence produced in discovery at the administrative level (JA 731 lines 9-14; JA 791); however, in its repeated motions for enlargements of time, the Agency stated that it needed additional information from its own client to respond to the *Complaint*, as well as to draft its *MSJ*. JA 791-792, *OMSJ* at 38-39. In fact, the Agency relied primarily on affidavits from its own employees after the administrative process had terminated and relied only minimally on the partial discovery that was conducted before the EEOC. (*Id.*)

The court's reliance on the erroneous factual conclusion that Dr. Hussain had an administrative hearing or full administrative discovery, constitutes reversible error. In addition, had Dr. Hussain been granted discovery, he could have subpoenaed and deposed former colleagues to testify about his job performance and the religious alliances and antagonisms at the hospital. The Agency has exclusive access to these witnesses and has submitted only the statements of employees that it selects. Current employees are highly unlikely to provide Dr. Hussain with voluntary statements, even if they are sympathetic and would testify favorably if subpoenaed. The Agency's retaliation against Dr. Hussain certainly has a "chilling effect" on current Agency employees. Even former employees normally prefer not to "be involved" unless forced to testify, by subpoena. Dr. Hussain needed discovery to secure their testimony.

D. The District Court Unduly Punished Dr. Hussain for his Former Attorney's Benign Neglect

Pursuant to *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 122 (D.C. Cir. 1977), there are circumstances under which a party should not suffer for the "blunder" of his attorney "when the lawyer "misled the client by reassuring him that the litigation was continuing smoothly when in fact it was suffering severely from lack of attention....." 435 F. 3d at 368, A-15 (Judge Rogers concurring).

Dr. Hussain *was* misled by Mr. Shaw.[17] Ms. Martin even explained to the Court that Mr. Shaw told her that discovery had been extended. JA 681, 683, 687, fn. 1, 712, fn. 3, 712-713.[18] Pursuant to *Jackson*, Dr. Hussain should not be deprived of his right to continue his case, after his substantial investment of time, money and *hope*, when discovery could have so easily been permitted. The judicial system would not have been burdened by re-opening discovery. In fact, the court would not have had to modify its schedule *at all*. There was no valid Scheduling Order at the time that Dr. Hussain requested that discovery be enlarged. The Agency

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[17] The Court advised Dr. Hussain to sue Mr. Shaw for malpractice (JA 721 lines 11-15). This suggestion was then impractical and now impossible. Dr. Hussain would have had to use *the very evidence that he was denied*, to prove that, with the missing evidence, he would have won his discrimination case. Then, Dr. Hussain would have to conduct a "trial within a trial," to determine whether a jury would have believed his version of the facts. This would have been at tremendous additional financial and emotional expense for Dr. Hussain, litigating against his own former counsel, with little chance of success. Mr. Shaw was killed in a car accident on July 23, 2005. He had no malpractice insurance.

[18] The question is whether Mr. Shaw deliberately misled Dr. Hussain or whether Mr. Shaw was actually misled himself -- by Defendant's counsel, Ms. Abel. Despite Judge Huvelle's statement that she found Mr. Shaw "incredible," there is some corroborating evidence for Mr. Shaw's assertions. The VA *did* withhold its *Answer until after it filed its Motion for Summary Judgment*. HB 14-15; RB 28. Mr. Shaw did draft discovery requests, which he submitted to the Court on July 22, 2004. JA 741-753.

had already destroyed the court's Scheduling Order through its motions for repeated enlargements of time to file its MSJ and its filing of its Answer to the *Second Amended Complaint* five months late.[19]

CONCLUSION

Dr. Hussain respectfully requests that this Court grant *certiorari* to correct the Court of Appeals' errors of law.

Respectfully submitted,

Dawn V. Martin, Esquire
D.C. Federal Bar No. 412384
Law Offices of Dawn V. Martin
1090 Vermont Avenue, Suite 800
Washington, D.C. 20005
(202) 408-7040 telephone

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[19] A District court may order sanctions, including a default judgment, for misconduct, either pursuant to Rule 37(b) (2) or pursuant to the Court's inherent power to protect its integrity and protect abuse of the judicial process. *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001). Where the attorney's failure to comply is not due to willful bad faith, however, preclusion of evidence which is tantamount to dismissal is inappropriate. There are three bases invoked to justify dismissal or a default judgment: 1) prejudice to the other party; 2) prejudice to the judicial system; and 3) the need to deter similar conduct in the future. *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998). These factors are useful in assessing whether the trial court abused its discretion by imposing the ultimate penalty of summary judgment on Dr. Hussain as a penalty for his former counsel's benign neglect. The trial judge called Mr. Shaw's inaction "willful action in contravention of the court's orders" (JA 733 lines 23-24), despite her concession that Mr. Shaw's failure to timely conduct discovery may have been "unintentional" (JA 733 line 22). The court administered punishment for benign neglect that was appropriate for willful contempt of court.

APPENDIX

MOHAMMED HUSSAIN, APPELLANT v. R. JAMES NICHOLSON, SECRETARY, DEPARTMENT OF VETERAN AFFAIRS, APPELLEE

No. 04-5417

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

369 U.S. App. D.C. 247; 435 F.3d 359; 2006 U.S. App. LEXIS 2290; 97 Fair Empl. Prac. Cas. (BNA) 466; 87 Empl. Prac. Dec. (CCH) P42,300

December 5, 2005, Argued
January 31, 2006, Decided

SUBSEQUENT HISTORY: Rehearing, en banc, denied by, Motion granted by *Hussain v. Nicholson, 2006 U.S. App. LEXIS 11109 (D.C. Cir., Apr. 19, 2006)*
Rehearing denied by, Motion granted by *Hussain v. Nicholson, 2006 U.S. App. LEXIS 11107 (D.C. Cir., Apr. 19, 2006)*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Columbia. (No. 03cv00367). *Hussain v. Nicholson, 2005 U.S. App. LEXIS 26529 (D.C. Cir., Dec. 2, 2005)*

COUNSEL: Dawn V. Martin argued the cause and filed the briefs for appellant.

Charlotte A. Abel, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were Kenneth L. Wainstein, U.S. Attorney, Michael J. Ryan, Assistant U.S. Attorney, and Karen A. Nappo, Counsel, U.S. Department of Veterans Affairs. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

JUDGES: Before: HENDERSON, ROGERS, and TATEL, Circuit Judges. Opinion for the Court filed by Circuit Judge TATEL. Concurring opinion filed by Circuit Judge ROGERS.

OPINIONBY: TATEL

OPINION:

[*361] TATEL, *Circuit Judge*: After eighteen years as a doctor at a public hospital, appellant, an Indian Muslim, applied to replace his retiring supervisor. When the hospital denied appellant the position, he filed an administrative complaint alleging discrimination based on race, religion, and national origin. As he pursued his claim, his relationship with the hospital deteriorated--among other things, officials reported concerns about his performance and then promoted his assistant to supervise him. Appellant eventually took early retirement [**2] and filed suit in federal court, charging the hospital with discrimination and retaliation in violation of *Title VII of the Civil Rights Act of 1964*. Appellant's then-attorney, however, neglected to conduct any discovery. Finding that appellant failed to provide sufficient evidence to support his claims, the district court granted summary judgment to the hospital. We affirm.

I.

Appellant Mohammed Hussain joined the Veteran Affairs Medical Center in 1978 as Assistant Chief of Radiation Therapy. When his supervisor retired in [*362] 1997, Hussain became Acting Chief of Radiation Therapy, a position which, though requiring increased administrative responsibilities, came with no additional pay. Although Hussain expressed interest in becoming permanent Chief of the division, he remained Acting Chief for the next several years.

In September 2000, hospital officials merged Hussain's division with another division, the Imaging Service, creating one unified Radiology Service. Dr. Klemens Barth, Chief of Imaging, was then appointed to the new position of Chief of Radiology Service. Hussain's title, duties, and compensation remained unchanged, but he now reported to Barth rather than directly [**3] to the hospital's Chief of Staff. Two months later, Hussain filed an Equal Employment Opportunity complaint alleging that the hospital failed to promote him to a permanent Chief position because of his race, religion, and national origin. Reiterating the same claims, he also filed a complaint with the Equal Employment Opportunity Commission (EEOC).

The following July, Barth hired an African-American woman, Dr. JoAnn Manning, as an additional staff physician in the Radiation Therapy division. Hussain asserts that although the hospital purported to hire Manning to assist Hussain, Barth excluded him from the hiring process and prevented him from supervising Manning.

Three months later, Hussain received a performance evaluation from the Chief of Staff, Ross Fletcher. Although Hussain's former supervisor had consistently given him excellent performance reviews, Fletcher rated Hussain as just "satisfactory," noting that "many issues have arisen

regarding Dr. Hussain." In a later evaluation rating Hussain as "low satisfactory," Barth observed that Hussain failed to "provide . . . effective leadership for the division." *Hussain v. Principi, 344 F. Supp. 2d 86, 92 (D.D.C. 2004).* [**4] In December 2002, Barth appointed Manning as permanent Chief of Radiation Therapy and demoted Hussain to Assistant Chief, with Manning as his supervisor.

Shortly thereafter, Hussain filed suit in federal court, charging the hospital with various torts and Title VII violations. In their affidavits, Manning and Barth allege that around this time they began encountering problems with Hussain's performance, particularly his failure to conduct adequate follow-up patient care. In June 2003, they renewed Hussain's clinical privileges for only three months, rather than the normal two-year period. They also informed Hussain that he would now have to document patient examinations and submit records for monthly review. At the end of July, Hussain informed the hospital that he would be taking "extended sick leave . . . until further notice." *Id. at 93.* When Hussain failed to provide medical documentation to support his absence, the hospital placed him on "Absence Without Leave" status. In September, Hussain took voluntary early retirement.

Hussain then amended his complaint (the second amended complaint) dropping several claims and retaining only those based on Title VII: failure [**5] to promote based on race, religion, and national origin; retaliation; hostile work environment; and constructive discharge. Although Hussain's then-attorney, Tony Shaw, took several depositions in connection with proceedings before the EEOC, he took no discovery at all during the six-month period allotted by the district court. After discovery closed, the hospital moved for summary judgment, at which point Hussain, represented by new counsel, Dawn Martin, moved to reopen discovery. The district court denied Hussain's

motion and granted summary judgment to the hospital on all claims. *See id. at 93-94, 107.*

[*363] Hussain now appeals, arguing that the district court erred in (1) denying his motion to reopen discovery, (2) finding no genuine issue of material fact with regard to his employment discrimination and retaliation claims, and (3) finding that he failed to state hostile work environment or constructive discharge claims.

II.

We begin with the discovery issue. In July 2004, after discovery closed, Hussain notified the district court that Martin had replaced Shaw as his attorney. Upon learning that Shaw had failed to conduct any discovery during the allotted time [**6] frame, Martin moved to reopen discovery under *Rule 16(b). See Fed. R. Civ. P. 16(b)* (permitting courts to modify their schedules if the requesting party shows "good cause"). Critical to the issue before us, this request came over three months after discovery closed and several weeks after the hospital filed its motion for summary judgment. Martin argued that because the hospital had only just filed its answer to Hussain's second amended complaint, the district court had good cause to grant a 90-day extension for discovery: "A defendant should not be permitted to obtain repeated extensions from the Court to respond to a Complaint, such that it delays the plaintiff [an] Answer to his/her Complaint throughout the entire discovery period, and then denies the Plaintiff the right to discovery." Pl.'s Mot. to Reopen Disc. 2. Martin also argued that without an opportunity for additional discovery, Hussain would be unable to establish that hospital officials had acted with discriminatory intent.

At a hearing on the motion to reopen discovery--a hearing attended by both Shaw and Martin--Shaw acknowledged "some lack of diligence" on his part, Mot.

Hr'g Tr. 4, July 22, 2004, but pointed [**7] out that the hospital also operated with "unclean hands" by repeatedly requesting extensions for its filings, *id.* at 6. The district court, observing that Hussain had a "great malpractice action" against Shaw, *id.*, stated: "You can't cite me a case . . . that says that I'm supposed to extend [discovery] because of your incompetence, can you? That is not good cause," *id.* at 8. The court also explained that although the hospital had asked for several extensions, it had always filed its motions in a timely manner. In its written ruling denying Hussain's motion, the court noted that since Hussain had taken several depositions during the administrative proceedings, he had not been "completely deprived of discovery." *Hussain, 344 F. Supp. 2d at 93.*

We review discovery rulings for abuse of discretion. *See Military Audit Project v. Casey, 211 U.S. App. D.C. 135, 656 F.2d 724, 750 (D.C. Cir. 1981).* We are especially reluctant to interfere with district court decisions regarding their own day-to-day operations. *See, e.g., United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 100 (D.C. Cir. 2001)* ("An appellate [**8] court will not interfere with the trial court's exercise of its discretion to control its docket and dispatch its business . . . except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant.") (quoting *Eli Lilly & Co., Inc. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1105 (5th Cir. 1972)).* In particular, district courts have "broad discretion in structuring discovery." *Edmond v. U.S. Postal Serv. Gen. Counsel, 292 U.S. App. D.C. 240, 949 F.2d 415, 425 (D.C. Cir. 1991); see also In re Multi-Piece Rim Prods. Liab. Litig., 209 U.S. App. D.C. 416, 653 F.2d 671, 679 (D.C. Cir. 1981)* ("A district court has broad discretion in its resolution of discovery problems that arise in cases pending before it."). Given this highly deferential standard, we see no basis for questioning the district court's [*364] denial of an enlargement of time for additional discovery.

Although Hussain now points to *Rule 56(f)* in support of his request to reopen discovery, *see Fed. R. Civ. P. 56(f)* (allowing courts to order additional discovery prior to ruling [**9] on a summary judgment motion), his district court motion relied solely on *Rule 16(b)*. We will therefore consider only his arguments relating to *Rule 16(b)*. *See District of Columbia v. Air Fla., Inc., 243 U.S. App. D.C. 1, 750 F.2d 1077, 1084 (D.C. Cir. 1984)* ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal."). In that regard, Hussain argues that the district court's "no good cause" finding rests on three factual errors and thus amounts to an abuse of discretion.

First, Hussain asserts that the court erred in finding that he had an opportunity to obtain adequate discovery at the administrative level, given that the hospital refused to comply with several administrative law judge (ALJ) orders to produce documents and witnesses for deposition, and that the ALJ took an indefinite leave of absence prior to completing the proceedings. The district court made no such error. Acknowledging that Hussain "may not have had a full administrative hearing," the court found only that he "did have an opportunity to obtain discovery at the administrative level regarding many of the same claims he pursues [**10] here." *Hussain, 344 F. Supp. 2d at 93-94*. This is accurate--Hussain took lengthy depositions of several key witnesses during the EEOC proceedings, including both Fletcher and Barth.

Hussain next claims that the district court incorrectly believed that the hospital filed all its motions on time, when in fact both its summary judgment motion and its answer to the second amended complaint were late. But even if this is true, we see no reason to think the court would have held differently had it realized these filings were untimely. The court explained that "because . . . there was *no* legitimate

reason why discovery had not yet been conducted, [it] had ample reason to reject plaintiff's motion." *Id. at 93.* Accordingly, the alleged error--if error at all--was harmless. *See, e.g., Barth v. Gelb, 303 U.S. App. D.C. 211, 2 F.3d 1180, 1188-89 (D.C. Cir. 1993)* (explaining that errors which have no effect on the outcome of a case are not grounds for reversal or remand).

Finally, Hussain argues that the district court's refusal to reopen discovery represents an overly harsh penalty for Shaw's negligence, given that the lawyer's "future [**11] misconduct was . . . more than sufficiently deterred" when his client fired him and the judge then "berated [him] in open court." Appellant's Br. 54. Hussain misunderstands the district court's holding. The court denied Hussain's motion not because it determined that Shaw deserved punishment, but because Hussain failed to establish good cause for modifying the discovery schedule. *See Hussain, 344 F. Supp. 2d at 93-94.*

We sympathize with Hussain, the victim of Shaw's negligence, and with Martin, who has tried hard to salvage her client's case. But as the Supreme Court has held, a party who voluntarily chooses his attorney "cannot . . . avoid the consequences of the acts or omissions of this freely selected agent." *Link v. Wabash R.R. Co., 370 U.S. 626, 633-34, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962).* Accordingly, because the primary reason for reopening discovery would have been to mitigate the damage Shaw inflicted on Hussain's case, the district court did not abuse its discretion in denying Hussain's motion.

III.

We turn to Hussain's discrimination and retaliation claims. We review de [*365] novo the district court's order granting summary judgment to the hospital, [**12] viewing the evidence in the light most favorable to Hussain. *See Tao*

v. Freeh, 307 U.S. App. D.C. 185, 27 F.3d 635, 638 (D.C. Cir. 1994).

Hussain's first claim is that the hospital unlawfully discriminated against him when it created the new Radiology Service and named Barth as its Chief. Because Hussain alleges discrimination via disparate treatment, the *McDonnell Douglas* three-step "shifting burdens" test applies. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).* We have described the *McDonnell Douglas* framework as follows:

> The complainant must first establish a *prima facie* case of prohibited discrimination. Once he has done so, the burden then shifts to the employer to articulate legitimate, nondiscriminatory reasons for the challenged employment decision. Should the employer succeed in presenting such reasons, the burden shifts back to the complainant, who then has an opportunity to discredit the employer's explanation. . . . The plaintiff at all times retains the ultimate burden of persuasion.

Aka v. Wash. Hosp. Ctr., 332 U.S. App. D.C. 256, 156 F.3d 1284, 1288-89 (D.C. Cir. 1998) [**13] (en banc) (internal citations omitted). The district court found that although Hussain established a prima facie case, he failed to rebut the legitimate reason offered by the hospital for putting Barth in the new Chief position, i.e., that Barth was better qualified than Hussain.

Hussain contends that the district court erroneously discounted evidence of his own qualifications, including his special skill in implementing brachytherapy, his involvement in charitable work and professional committees, and his faculty position at Georgetown University. He also points to

various documents which contradict the hospital's claim that he failed to hire necessary staff, correct personnel problems, and request important equipment. But even viewed in the light most favorable to Hussain, this evidence merely shows that Hussain was a better candidate than the hospital admits, not that he was more qualified than Barth. Under *Aka*, comparing qualifications is insufficient to establish discriminatory intent unless the plaintiff is "significantly better qualified" than the person who obtained the position. *156 F.3d at 1294*. Given Barth's numerous publications, several university affiliations, [**14] and success in running the significantly larger Imaging Service, we agree with the district court that Hussain failed to discredit the hospital officials' claim that they believed Barth to be better suited for the promotion. Hussain argues that the district court failed to consider whether evidence of "religious alliances and animosity" revealed hospital officials' discriminatory intent, Appellant's Br. 41, but the district court correctly found that Hussain's evidence of religious animus consisted merely of conclusory allegations in his own affidavit. *See Dist. Intown Props. Ltd. P'ship v. District of Columbia, 339 U.S. App. D.C. 127, 198 F.3d 874, 878 (D.C. Cir. 1999)* ("In deciding whether there is a genuine issue of material fact, the court must assume the truth of all statements proffered by the non-movant *except for* conclusory allegations lacking any factual basis in the record." (emphasis added)). Accordingly, the district court properly granted summary judgment to the hospital on this claim.

Hussain next claims that hospital officials discriminated against him when they declined to appoint him permanent Chief of Radiation Therapy and instead promoted Manning [**15] to the position. Following *McDonnell Douglas*, the district court again found that Hussain failed to rebut the hospital officials' claim that they gave the job to the most qualified candidate. [*366] Although Hussain had worked

at the hospital much longer than Manning. Manning had fifteen years of radiation therapy experience, numerous publications, and an affiliation with Georgetown Hospital. Given this evidence, we agree with the district court that because Hussain failed to demonstrate pretext, summary judgment on this claim was proper.

For his third claim, Hussain argues that the hospital unlawfully retaliated against him for pursuing his discrimination complaint. In particular, he cites twelve alleged acts of retaliation: (1) Manning's appointment as permanent Chief of Radiation Therapy, (2) a report to the hospital's Peer Review Panel regarding Hussain's possible involvement in a malpractice suit, (3) denial of special pay, (4) denial of clinical privileges, (5) heightened monitoring by supervisors, (6) poor performance evaluations, (7) denial of medical leave, (8) delay in forwarding retirement application forms, (9) denial of counsel during a discussion about retirement and failure [**16] to provide a written copy of retirement options, (10) denial of access to his personnel file, (11) termination threats, and (12) failure to address insubordination by other employees.

Under *Brown v. Brody, 339 U.S. App. D.C. 233, 199 F.3d 446, 452 (D.C. Cir. 1999)*, plaintiffs alleging retaliation must demonstrate that (1) they engaged in statutorily protected activity, (2) the employer took an adverse employment action against them, and (3) a causal connection existed between the two. The district court found that although Hussain's discrimination complaint satisfied the first requirement, each of his twelve claims failed either because the alleged act fell short of an actionable adverse action or because Hussain provided insufficient evidence of a causal connection. The court then dismissed Hussain's hostile work environment and constructive discharge claims, explaining that Hussain failed to show that "any allegedly disparaging conduct by the defendant was based on

plaintiff's race, religion, or national origin." *Hussain, 344 F. Supp. 2d at 107.*

Rather than responding to these findings directly, Hussain argues that the district court overlooked [**17] his claim that the twelve alleged retaliatory acts, when combined, created a hostile work environment and constituted constructive discharge. "Retaliation," Hussain argues, "may take the form [of] one or more separate, discreet acts, or may be so frequent, severe, pervasive and harassing, that, together, the individual acts create a retaliatory hostile work environment under Title VII." Appellant's Br. 42.

As a matter of law, Hussain makes an excellent point. In this circuit, a hostile work environment can amount to retaliation under Title VII. *See Singletary v. District of Columbia, 359 U.S. App. D.C. 1, 351 F.3d 519, 526 (D.C. Cir. 2003).* To prevail on such a claim, however, Hussain must show that the hospital subjected him to "discriminatory intimidation, ridicule, and insult" of such "severity or pervasiveness [as] to alter the conditions of [his] employment and create an abusive working environment." *Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)* (quoting *Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)).* But Hussain has failed to make such a showing. As the district [**18] court explained, Hussain exaggerates several of his claims: The record clearly shows that the hospital never reported him for malpractice, revoked his clinical privileges, or denied him special pay or medical leave. *See Hussain, 344 F. Supp. 2d at 104 n.25.* Although the work environment described by Hussain was hardly ideal, we think no reasonable jury could find it "abusive" under the standard set forth in *Harris. Cf. Singletary, 351* [*367] *F.3d at 528-29* (declining to grant summary judgment against an employee claiming hostile work

environment where, for over a year and a half, the employee was forced to work in a poorly lit, unheated, and unventilated storage room full of brooms and boxes of debris). Nor do we believe that a reasonable jury could find in Hussain's favor with regard to his constructive discharge claim: Even when considered collectively, his allegations fail to establish a "working environment . . . so intolerable that [his] resignation qualified as a fitting response." *Pa. State Police v. Suders, 542 U.S. 129, 134, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004).*

IV.

Concluding that the district court neither abused its discretion [**19] in refusing to reopen discovery nor erred in finding that Hussain failed to present any triable Title VII claims, we affirm the grant of summary judgment to the hospital on all counts.

So ordered.

CONCURBY: ROGERS

CONCUR:

ROGERS, J., *concurring*: As the court observes, our review of discovery rulings for abuse of discretion reflects a "reluctance to interfere with district court decisions regarding their own day-to-day operations." Op. at 6. However, the court's reluctance is tempered where there is "the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant." *Id.* (quoting *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 100 (D.C. Cir. 2001)).* In my view, our conclusion that the district court did not abuse its discretion in denying Hussain's motion to reopen discovery follows from a slightly different analysis than is adopted by the court of Hussain's contention that the refusal to grant his

motion was an overly harsh penalty for his attorney's negligence. *See* Op. at 7-8.

Federal Rule of Civil Procedure 16(b) provides that a scheduling [**20] order "shall not be modified except upon a showing of good cause . . . ." The advisory committee notes on the Rule explain that there is good cause "if [the schedule] cannot reasonably be met despite the diligence of the party seeking the extension." *FED. R. CIV. P. 16(b)* advisory committee's notes (1983 amendments). Several circuit courts of appeal have held that "*Rule 16(b)*'s 'good cause' standard primarily considers the diligence of the party seeking the [modification]. . . . If that party was not diligent, the inquiry should end." *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992); see also O'Connell v. Hyatt Hotels of Puerto Rico, 357 F.3d 152, 155 (1st Cir. 2004); Inge v. Rock Fin. Corp., 281 F.3d 613, 625 (6th Cir. 2002); Bradford v. DANA Corp., Inc., 249 F.3d 807, 809 (8th Cir. 2001); Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000).* Some courts secondarily consider the "possible prejudice to the party opposing the modification." *Inge, 281 F.3d at 625; see also Reliance Ins. Co. v. Louisiana Land & Exploration, 110 F.3d 253, 257 (5th Cir. 1997).* [**21]

Under those precedents, the primary consideration in determining whether the district court abused its discretion by refusing to reopen discovery is whether Dr. Hussain was diligent in conducting discovery within the schedule set by the district court. Hussain's attorney conducted no discovery within that period, and his motion to reopen discovery came three and a half months after the discovery period had ended. The only asserted reason for this lack of diligence was attorney neglect. Yet "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Johnson, 975 F.2d at 609.*

[*368] The question remains whether Hussain can be deemed diligent in complying with the scheduling order although his attorney was not. The general rule is that a client is held accountable for his attorney's conduct. *See, e.g., Link v. Wabash R.R. Co., 370 U.S. 626, 633-34, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962); Camps v. C & P Tel. Co., 223 U.S. App. D.C. 396, 692 F.2d 120, 123-24 (D.C. Cir. 1981).* The First Circuit has confronted two cases under *Rule 16(b)* in which parties blamed their lack of diligence on attorney error, and in both [**22] cases the court replied, "Attorneys represent clients, and, as a general rule, an attorney's blunder binds her client." *O'Connell, 357 F.3d at 155; Rosario-Diaz v. Gonzalez, 140 F.3d 312, 315 (1st Cir. 1998).* Were this court to follow the interpretation of *Rule 16(b)* adopted by other circuits and hold Hussain accountable for his counsel's behavior, "the inquiry should end" because Hussain "was not diligent." *Johnson, 975 F.2d at 609.*

This court, however, has not viewed the attorney-blunder rule to be without exception. The court has recognized in the context of the dismissal of a complaint that a party should not bear the consequences of attorney misdeeds when the lawyer "misled the client by reassuring him that the litigation was continuing smoothly when in fact it was suffering severely from lack of attention." *Jackson v. Washington Monthly Co., 186 U.S. App. D.C. 288, 569 F.2d 119, 122 (D.C. Cir. 1977).* And on appeal, as noted, the court will determine whether there is "the clearest showing [of] actual and substantial prejudice." *Microsoft, 253 F.3d at 100.* Although Hussain does not assert that [**23] he was misled by his attorney as in *Jackson*, he did argue to the district court that he was being unfairly punished for his former attorney's negligence by being forced to oppose the hospital's motion for summary judgment without discovery. In my view, the district court's evaluation of the nature of the discovery that Hussain obtained during the EEOC proceedings precludes a finding that Hussain has made the

clear showing of "actual and substantial prejudice" required for the court to conclude that the district court abused its discretion in denying his motion to reopen discovery. Thus, were this court to interpret "good cause" under *Rule 16* to embrace consideration of prejudice, Hussain's contention that the lack of evidence with which to respond to the hospital's motion constituted good cause to reopen discovery would fail.

The district court expressly addressed whether Hussain would be unfairly prejudiced in his ability to oppose summary judgment if he were not permitted to reopen discovery. *See Hussain v. Principi, 344 F. Supp. 2d 86, 93-94 (D.D.C. 2004)*. In denying Hussain's motion to reopen discovery, the district court relied partially on the ground that [**24] he was not "completely deprived of discovery" because his attorney had taken "lengthy depositions" of Dr. Barth, Dr. Fletcher and Mr. Garfunkel during the EEOC proceedings. *Id.* The district court noted that "these depositions covered the merger of the Radiation Therapy and Imaging Services, Dr. Barth's appointment as Chief of Radiology, the Peer Review Panel, the hiring of Dr. Manning, the administration's reaction to [Hussain's] EEO complaints, and many other topics." *Id. at 94*. The district court thus found that Hussain "did have an opportunity to obtain discovery at the administrative level regarding many of the same claims he pursues here." *Id. at 93-94*.

Because a litigant seeking discovery may be unable to identify the nature of the information sought, it would be inappropriate to place such a burden on the moving party. But Hussain is in a somewhat different position as a result of the administrative discovery he had obtained. In the district court, Hussain suggested a number [*369] of inquiries he would pursue were discovery reopened, for the most part involving new lines of questioning with the individuals he had previously deposed, but also [**25] involving his desire

to depose Dr. Manning and Dr. Patel, both of whom he was unable to depose in the administrative proceeding. Assuming further depositions could reveal helpful information, Hussain nonetheless fails, in light of the evidence he could rely upon in opposing the hospital's motion for summary judgment, to make "the clearest showing [of] actual and substantial prejudice." *Microsoft, 253 F.3d at 100.* He could rely upon the depositions of Dr. Barth, Dr. Fletcher, and Mr. Garfunkel; the EEO investigative file; his own deposition and affidavit; the 109 exhibits from his personal files; and any affidavits he could collect from current and former hospital employees. Deposing Drs. Manning and Patel would appear to be of questionable worth as neither was a central figure in Hussain's discrimination or retaliation claims; he sought their depositions only to show that Dr. Manning's view of his poor performance was inspired by her self-interest and that Dr. Patel's view of his poor performance was inspired by anti-Muslim bias.

Accordingly, I concur.

MOHAMMED HUSSAIN, Plaintiff, v. ANTHONY PRINICIPI, Secretary, DEPARTMENT OF VETERAN AFFAIRS, Defendant.

Civil Action No. 03-0367 (ESH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

344 F. Supp. 2d 86; 2004 U.S. Dist. LEXIS 21902

October 28, 2004, Decided

SUBSEQUENT HISTORY: Motion denied by Hussain v. Nicholson, 2005 U.S. App. LEXIS 11983 (D.C. Cir., June 14, 2005)

DISPOSITION: Defendant's motion for summary judgment granted.

COUNSEL: [**1] For MOHAMMED A. HUSSAIN, Plaintiff: Frederic M. Brandes, Timonium, MD. Tony O. Shaw, Washington, DC. Dawn V. Martin, Washington, DC.

For ANTHONY PRINCIPI, Secretary, Department of Veteran Affairs, SANFORD GARFUNKEL, as Director of VAMC Hospital in Washington, D.C. and Individually, ROSS FLETCHER, as Chief of Staff of the VAMC Hospital in Washington, D.C. and Individually, KLEMENS BARTH, as Chief of Radiology Service of the VAMC Hospital in Washington, D.C. and Individually, JOAN MANNING, both a physician and Chief of Radiation Oncology at the VAMC Hospital in Washington, D.C. and Individually, STEVEN KRASNOW, as Chief of Medical Oncology at VAMC Hospital in Washington, D.C. and Individually, KYU LEE, as attorney in the Defendant VAMC Hospital and the

individually named defendants, and individually, Defendants: Charlotte A. Abel, UNITED STATES ATTORNEY'S OFFICE, Washington, DC.

JUDGES: ELLEN SEGAL HUVELLE, United States District Judge.

OPINIONBY: ELLEN SEGAL HUVELLE

OPINION: [*90] ***MEMORANDUM OPINION***

Plaintiff, a male Muslim employed by the Department of Veterans Affairs ("VA") for twenty-five years, has brought an employment discrimination suit under Title VII of the Civil Rights Act of [**2] 1964, as amended, 42 U.S.C. ?? 2000e *et seq.*, alleging discriminatory failure to promote, retaliation, hostile work environment, and constructive discharge based on his race, religion, and national origin. n1 Defendant has moved for summary judgment. For the reasons set forth below, the Court concludes that defendant's motion should be granted.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Although plaintiff's opposition to summary judgment also makes reference to age discrimination, his second amended complaint fails to allege such a violation.

BACKGROUND

I. Factual Background

Plaintiff is a "dark-skinned" Muslim who was born in India. He joined the Washington D.C. Veterans Affairs Medical Center ("VAMC") as a physician in 1978. At that time he held the title of Assistant Chief of Radiation Therapy n2 and was supervised by Dr. Steven Lunzer, Chief of the Radiation Therapy Service. (Pl.'s Ex. A (hereinafter "Hussain Aff.") PP 1, 5-6). Plaintiff was responsible for treating cancer patients undergoing radiation [**3] therapy. In annual performance reviews, Dr. Lunzer consistently gave plaintiff ratings of "high satisfactory." n3 (Pl.'s Ex. B.)

Dr. Lunzer retired in 1997 and plaintiff was appointed Acting Chief of the Radiation Therapy Service. The position of Acting Chief demanded more administrative responsibilities, but was not accompanied by a pay raise. (Hussain [**4] Aff. PP 21-22.) As Acting Chief, Dr. Hussain reported directly to the hospital's Chief of Staff, Dr. Fletcher. *(Id. P28.)* Dr. Hussain was the only physician in the

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n2 The parties' briefs and the record refer to this department interchangeably as "Radiation Therapy" and "Radiation Oncology." It appears that the name of the department was changed to "Radiation Oncology" after it became part of the Radiology Service. (Pl.'s Ex. W-1 (Memo from Mr. Garfunkel, Director).) To avoid confusion, the Court will refer to the department only as "Radiation Therapy."

n3 Possible ratings included "low satisfactory," "satisfactory," "high satisfactory," or "excellent."

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Radiation Therapy Service from Dr. Lunzer's retirement in 1997 until 2001. *(Id. P21.)* During this time, he indicated to hospital officials an interest in becoming permanent Chief of the Radiation Therapy Service, but his requests went "unanswered." *(Id. P24;* Pl's Ex. 0-2 (1999 Letter to Dr. Sapagnolo, Chief of Staff).) n4

[*91] On September 26, 2000, the Director of VAMC, Mr. Garfunkel, distributed a memorandum informing all employees that, beginning October 15, 2000, the Radiation Therapy, Service would be merged with the Imaging Service to create a unified "Radiology Service." (Pl.'s Ex. W-1 (Memo from Mr. Garfunkel, Director).) Dr. Klemens Barth, then **[**5]** Chief of the Imaging Service, was appointed Chief of the newly created Radiology Service. The hospital did not advertise or form a search committee for this position. (Hussain Aff. P 32; Fletcher Aff.; Garfunkel Aff.) After the merger, Radiation Therapy became a "division" within the Radiology Service, rather than an independent "service." (Pl.'s Ex. W-1.) Plaintiff remained Acting Chief of Radiation Therapy, but now he reported to Dr. Barth, who in turn reported to Dr. Fletcher. Plaintiff's duties, compensation, and supervisory responsibilities remained the same, as did the division's budget and staff. *(Id.)*

On November 29, 2000, plaintiff filed an informal Equal Employment Opportunity ("EEO") complaint pursuant to 29 C.F.R. 1614, claiming that he had been denied

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n4 Dr. Sapagnolo was Chief of Staff until May 1999, when Dr. Fletcher was appointed to the position of Acting Chief of Staff. Dr. Fletcher was made permanent Chief of Staff in January 2000.

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promotion to the permanent position of Chief of Radiation Therapy and "demoted" by way of the merger on the basis of his race, age, religion, and national origin. (Pl.'s Ex. S.)

In January 2001 plaintiff received a memo from Mr. Garfunkel stating that he *"may* be reported" to the National Practitioner's Data Bank ("NPDB") n5 as a result of a medical malpractice claim settled by the VAMC in March 2000. n6 (Pl.'s **[**6]** Ex. J-25 (emphasis in original).) The patient's claim was based on lack of informed consent for undergoing radiation therapy. Hospital administrators had identified plaintiff because he was the physician responsible for informing the patient of the risks associated with this procedure. (Def.'s Ex. 3 at 6; Fletcher Dep. at 166.) Pursuant to hospital protocol, the hospital had submitted plaintiff's name to the VA "Peer Review Panel" in Buffalo, which would then determine whether reporting to the NPDB would be appropriate. (Fletcher Aff. P4; Def.'s Ex. 3 at *3; see* Def.'s Reply at 8.) Also in January 2001 Dr. Fletcher submitted a letter to the Peer Review Panel stating that plaintiff did not provide substandard care and recommending that plaintiff *not* be reported to the NPDB. (Pl.'s Ex. BB (email from Dr. Fletcher to Dr. Hussain); Def.'s Ex. 3 at 2 (letter from Dr. Fletcher to Medical-Legal Affairs Department).) The Peer Review

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n5 NPDB is a database managed by the United States Department of Health and Human Services intended to restrict the ability of health care practitioners to move from state to state without discovery of previous malpractice.

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Panel, finding no deviation from the standard of care, decided not to report Dr. Hussain to NPDB. The matter ended there. (Pl.'s Ex. CC (memo re: Conclusions of Review Panel).)
[7]**

On February 14, 2001, plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") asserting the same claims as his initial EEO complaint. In addition, plaintiff claimed that the hospital had submitted his name to the Peer Review Panel as retaliation for filing his earlier EEO complaint. (Pl.'s Ex. T.)

Since Dr. Lunzer's retirement, Dr. Hussain had been complaining that his department was short staffed, causing him to be "on call" 365 days a year. (Hussain Aff. P21.) In July 2001, Dr. Barth hired Dr. JoAnn Manning, an African American female, **[*92]** as an additional staff physician in the Radiation Therapy Division. n7 (Pl.'s Ex. U.)

Between July 2001 and December 2001, plaintiff did not receive approximately $ 23,000 in "special pay" to which

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n6 Plaintiff asserts that VAMC reported him to the NPDB (Pl.'s Opp'n at 27-28), but the undisputed facts in the record clearly prove otherwise. *(See infra* note 25.)
n7 Dr. Barth extended an unofficial offer to Dr. Manning in July 2001. It is unclear from the record when she received her official offer or began working at VAMC, but it appears to have been sometime in the fall of 2001.
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[8]**
he was entitled. (Hussain Aff. P55.) Plaintiff discovered the problem in January 2002 when he received his W-2 tax form for the 2001 calendar year. Plaintiff concedes that the error originated in his failure to renew his special pay contract with the VAMC"s Human Resources Department. (Hussain Dep. at 98-105.)

In October 2001 plaintiff received his first performance review since Dr. Lunzer's retirement. Dr. Fletcher, who conducted the review, gave plaintiff a "satisfactory" rating, stating that "many issues have arisen regarding Dr. Hussain." (Pl.'s Ex. NN-2.) Plaintiff's next performance review, conducted by Dr. Manning and approved by Dr. Barth in August 2002, gave him an overall rating of "low satisfactory." (Pl.'s Ex. PP.) Among other comments, Dr. Manning stated that Dr. Hussain did "not provide an effective leadership for the division." *(Id.)*

On December 20, 2002, Dr. Barth appointed Dr. Manning as Chief of Radiation Therapy, with Dr. Hussain remaining as Acting Chief only in her absence. At this time, Dr. Manning became Dr. Hussain's supervisor and his title **[**9]** reverted back to that of Assistant Chief. Dr. Hussain's compensation and duties remained the same, except that he was relieved of his administrative responsibilities. (Pl.'s Ex. N.) Dr. Manning took on these responsibilities but did not receive a pay increase. (Manning Aff. P4.)

As Chief of Radiation Therapy and Radiology respectively, Dr. Manning and Dr. Barth encountered a number of problems with Dr. Hussain's performance. (Manning Aff.; Barth Aff.) One of the issues of most concern was his failure to conduct adequate follow-up with radiation therapy patients. Though the American College of Radiology ("ACR") Standards for Radiation Oncology provide that

follow-up evaluations by the radiation oncologist are "essential," Dr. Hussain believed that patients need only see their primary treating clinics for follow-up care. (Def.'s Ex. 2 at 11 (4/28/03 email from Dr. Hussain to Dr. Manning) and at 14 (ACR Standards).) n8 Apparently as a result of this concern, Dr. Hussain's clinical privileges were renewed "with modifications" in June of 2003. (Def's Ex. 4 at 2.) The modifications provided that Dr. Hussain would be required to document the results of weekly examinations of his patients **[**10]** and that documentation would be reviewed monthly. His privileges were renewed for a three-month period rather than the normal two-year period. *(Id.)* Upon review of the required documentation in August 2003, Dr. Barth and Dr. Manning found "an alarming pattern that Dr. Hussain finds it appropriate to copy and paste other physicians [sic] assessment into electronic patient record without giving evidence that he has actually seen and examined the patient prior to, during, or after treatment." (Def's Ex. 4 at 5.) On August 26, 2003, Dr. Barth informed Dr. Hussain, who at the time was on extended medical leave, that his clinical privileges would be extended for one month, but upon returning from medical leave, he would have to fully comply **[*93]** with ACR guidelines to extend his privileges further. (Def.'s Ex. 4 at 1.)

Dr. Hussain began his extended medical absence on July 28, 2003. The **[**11]** next day he provided a letter from

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n8 Dr. Hussain was provided with a copy of the American College of Radiology Standards in November 2002 as a reminder. (Def.'s Ex. 2 at 4.)

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his doctor stating that "extended sick leave [was] necessary until further notice." (Pl.'s Ex. TT.) The letter stated that "his emotional state doesn't allow him to continue to be exposed to the very stressful work environment" and recommended reevaluation at one- month intervals. *(Id.)* On August 5, 2003, Dr. Manning informed Dr. Hussain that she could not approve his sick leave request beyond August 11 without further medical documentation.. Dr. Hussain appears not to have responded to this request and was thus placed in "Absence Without Leave" status as of August 12, 2003. n9 (Pl.'s Ex. UU.) In September 2003 plaintiff opted for early retirement and left defendant's service. (Pl.'s Ex. WW.)

II. Plaintiff's Lawsuit

Plaintiff commenced this suit in February 2003 and filed his Second Amended Complaint on November 7, 2003. The government filed its Motion for Summary Judgment on June 18, 2004. Over a month after this motion had been filed and three and a half months after discovery had closed, plaintiff moved to reopen discovery. (Pl.'s Mot. to Reopen Disc., July 9, 2004.) The Court denied this motion for lack of good cause, finding that the only reason no discovery had been taken was neglect by

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n9 Dr. Hussain states that his "physicians followed all necessary protocols" to place him on medical leave, but does not specifically mention responding to Dr. Manning's request. (Pl.'s Opp'n at 31.) Defendant contends that he never responded. (Def.'s Mot. at 15.) This dispute is, however, not material.

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[**12]
plaintiffs counsel. (*See* Tr. of July 22, 2004 hr'g at 17-18.)

Plaintiff, now represented by new counsel, complains that because "there is little evidence in the record [and] no discovery has taken place," summary judgment based on plaintiffs failure to produce sufficient evidence would be "tantamount to default judgment " and an unfair "penalty." (Pl.'s Opp'n at 37, 39.) The Court disagrees. Because discovery was closed and defendant had moved for summary judgment before plaintiff even moved to reopen discovery, and there was *no* legitimate reason why discovery had not yet been conducted, the Court had ample reason to reject plaintiff's motion. While "summary [**13] judgment should be entered only 'after adequate time for discovery,'" *Berkeley v. Home Ins. Co.* 314 U.S. App. D.C. 358, 68 F.3d 1409, 1414 (D.C. Cir. 1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)), plaintiff had more than adequate time for discovery here, but his counsel did not take advantage of it. The counsel who represented plaintiff during the discovery period conceded that "there has been some lack of diligence," and in fact, he had "screwed up." (Tr. of July 22, 2004 hr'g at 4, 10.) Since "the non-moving party has not diligently pursued discovery of the evidence," this Court is under no obligation to grant belated requests for discovery, *Berkeley*, 68 F.3d at 1414 (internal quotation marks omitted) (quoting *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 n. 4 (5th Cir. 1993)), nor can plaintiff complain at this late date that he lacks the evidence to respond to defendant's dispositive motion.

Plaintiff also wrongly suggests that he has been completely deprived of discovery. While plaintiff may not have had a full administrative hearing, he did have an opportunity [**14] to obtain discovery at the administrative

level regarding many of the [*94] same claims he pursues here. Plaintiff was represented by counsel during the EEOC proceedings and took lengthy depositions of Dr. Fletcher, Dr. Barth and Mr. Garfunkel. (Fletcher Dep. (Mar. 1, 2002); Barth Dep. (Mar. 12, 2002); Garfunkel Dep. (Mar. 14, 2002).) These depositions covered the merger of the Radiation Therapy and Imaging Services, Dr. Barth's appointment as Chief of Radiology, the Peer Review Panel, the hiring of Dr. Manning, the administration's reaction to plaintiff's EEO complaints, and many other topics. Thus, plaintiff's protests of prejudice ring hollow, and the Court will proceed to consider defendant's motion for summary judgment.

ANALYSIS

I. Legal Standard

Under Fed. R. Civ. P. 56, a motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In considering a motion for summary [**15] judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255; *see also Wash. Post Co. v. United States Dept of Health and Human Servs.*, 275 U.S. App. D.C. 101, 865 F.2d 320, 325 (D.C. Cir. 1989).

The non-moving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S.

at 324. The non-moving party must provide evidence that would permit a reasonable jury to find in the non-moving party's favor. *Laningham v. United States Navy*, 259 U.S. App. D.C. 115, 813 F.2d 1236, 1242 (D.C. Cir. 1987). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (internal citations omitted). "While summary judgment must be approached with special caution in discrimination cases, a plaintiff is not relieved of [his] obligation to support [his] allegations **|**16|** by affidavits or other competent evidence showing that there is a genuine issue for trial." *Calhoun v. Johnson*, 1998 U.S. Dist. LEXIS 22376, No. 95-2397, 1998 WL 164780, at *3 (D.D.C. March 31, 1998) (internal citation omitted), *aff'd*, 1999 U.S. App. LEXIS 25165, No. 99-5126, 1999 WL 825425, at * 1 (D.C. Cir. Sept. 27, 1999).

Plaintiff claims discrimination based on disparate treatment, thus triggering the application of the *McDonnell Douglas* three-part "shifting burdens" test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Plaintiff has the initial burden of proving a prima facie case of discrimination. *Id.* at 802. To do so, plaintiff must establish: (1) that he is a member of a protected class; (2) that he suffered an adverse employment action; and (3) that the unfavorable action gives rise to an inference of discrimination. *Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 452 (D.C. Cir. 1999). If he succeeds, the burden then shifts to defendant to articulate some legitimate, nondiscriminatory reason for its actions. *Id.* Its burden is only one of production, and it "need not persuade the court that it was actually **|**17|** motivated by the proffered reasons." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993) ("The determination that a

defendant [*95] has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment."). If defendant is successful, then "the *McDonnell Douglas* framework -- with its presumptions and burdens -- disappear[s], and the sole remaining issue [is] discrimination *vel non.*" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) (internal citations and quotation marks omitted). At that point, plaintiff has the burden of persuasion to show that defendant's proffered nondiscriminatory reason was not the true reason for the employment decision. Burdine, 450 U.S. at 256; *see also* Morgan v. Fed. Home Loan Mortgage Corp., 356 U.S. App. D.C. 109, 328 F.3d 647, 651 (D.C. Cir. 2003) ("although the *McDonnell Douglas* framework shifts intermediate evidentiary burdens [**18] between the parties, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff') (internal citations and quotation marks omitted).

"At this stage, if [plaintiff] is unable to adduce evidence that could allow a reasonable trier of fact to conclude that [defendant's] proffered reason was a pretext for discrimination, summary judgment must be entered against [plaintiff]." Paquin v. Fannie Mae, 326 U.S. App. D.C. 224, 119 F.3d 23, 27-28 (D.C. Cir. 1997). Pretext may be established "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256.

II. Discrimination

It is undisputed that plaintiff is a Muslim who was born in India, and he therefore satisfies the first prong of *McDonnell Douglas*. His next task is to establish that he suffered an adverse employment action. Plaintiff's discrimination claim boils down to two alleged adverse actions: the creation of the new Radiology Service with **[**19]** Dr. Barth as its Chief and the appointment of Dr. Manning as Chief of Radiation Therapy. n10 Plaintiff does not allege that he lost pay or benefits as a result of these actions, arguing instead that they were "failures to promote" and that each resulted in him being "kicked down" a level in the hospital hierarchy. (Pl.'s Opp'n at 12-17.)

To establish an adverse personnel action in the absence of diminution of pay or benefits,, plaintiff must show an action with "materially adverse consequences affecting the terms, conditions, or privileges of [his] employment. **[**20]** " *Brody*, 199 F.3d at 457. An "employment decision does not rise to the level of an actionable adverse action unless there is a tangible change in the duties or working conditions constituting a material employment disadvantage." *Walker v. Washington Metro. Area Transit Auth.*, 102 F. Supp. 2d 24, 29 (D.D.C. 2000) (citation omitted); *see also Burlington*

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n10 In his opposition, plaintiff for the first time cites all the actions alleged in his Complaint as "retaliatory" as also being "discriminatory." The Court will consider these additional actions under plaintiff's retaliation claim. Since the success of each type of claim depends on first demonstrating that the actions were "adverse," and plaintiff cannot do so, it makes no difference whether they are cast as claims of "retaliation" or "discrimination."

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Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

[*96] A. Nonselection As Chief of Radiology

Plaintiff suggests that the merger was an adverse action in part because it made Dr. Barth his supervisor and "bumped [him] down" a rung on the "reporting hierarchical ladder." (Pl.'s Opp'n at 17.) He proposes that "where an additional level of supervision is placed upon employees, it is a demotion." *(Id.* at 16.) Semantics aside, the real question is whether this "bump" constitutes "objectively tangible harm." *Brody*, 199 F.3d at 457. **[**21]** Contrary to plaintiff's assertion, courts have held that the appointment of a new supervisor alone is not an adverse action. *Forkkio v. Powell*, 353 U.S. App. D.C. 301, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (reorganization which resulted in a former colleague becoming plaintiffs supervisor was not adverse action); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994) (employee's change in title coupled with a new reporting relationship that required plaintiff to report to a former subordinate who was a manager rather than the senior vice president, to whom plaintiff had formerly reported, was not an adverse action).

To be an adverse action, a reorganization must result in a significant change in job responsibilities or benefits. *Forkkio*, 305 F.3d at 1131; *see Ellerth*, 524 U.S. at 761 (1998); *see also Jones v. Billington*, 12 F. Supp. 2d 1, 13 (D.D.C. 1997) ("Not everything that makes an employee unhappy is an actionable adverse action.") (citation and quotation marks

omitted), *aff'd without op.*, 1998 U.S. App. LEXIS 15459, 1998 WL 389101, at *1 (D.C. Cir. 1998). Here, plaintiff himself states that **[**22]** his duties remained *"exactly the same"* before and after the merger. (Pl.'s Opp'n at 17 (emphasis in original).) His pay, grade, and benefits were also untouched. (Pl.'s Ex. W-1.) The sole consequence of the merger was that Dr. Hussain reported to Dr. Barth instead of directly to Dr. Fletcher. (Pl.'s Opp'n at 16.) Thus, the reorganization alone was not an adverse action and cannot serve as the basis for a claim of discrimination.

Plaintiff also suggests that Mr. Garfunkel's "pre-selection" of Dr. Barth as Chief of the newly merged Radiology Service was an adverse action. n11 Plaintiff alleges that VAMC "did not consider Dr. Hussain for the position or allow him any opportunity to apply for it . Dr. Barth was pre-selected for the newly created position." (Pl.'s Opp'n at 16.)
[23]**

Some courts have analogized the failure to allow an employee to compete for a position to a refusal to promote. *Cones v. Shalala*, 339 U.S. App. D.C. 299, 199 F.3d 512, 521 (D.C. Cir. 2000). To establish a prima facie case of nonselection or failure to promote, plaintiff must at least show that: "(1) he is a member of a protected class; (2) he applied for and was qualified for an available position; (3)

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n11 Plaintiff also tries to frame this claim as one of "demotion." (Pl.'s Opp'n at 16.) Since the key question is whether the action was "adverse," regardless of how the personnel action is characterized, the Court will not consider the demotion allegation separately. *See Brody*, 199 F.3d at 455 ("We are less concerned with the kind of employment action involved, than with its effect on the employee.")
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despite his qualifications he was rejected; and (4) either someone filled the position or the position remained vacant and the employer continued to seek applicants." *Lathram v. Snow*, 357 U.S. App. D.C. 413, 336 F.3d 1085, 1088 (D.C. Cir. 2003) (internal quotation marks and citations omitted).

Defendant argues that there was no vacancy, and even if one had existed, Dr. Hussain never applied for it. (Def.'s Mot. at 7-8.) "Courts have generally held that the failure to formally apply for a job opening will not bar a Title VII plaintiff **[*97]** from establishing a prima facie case of discriminatory hiring, as long as the plaintiff made every reasonable attempt to convey his interest in the job to the employer." *Cones*, 199 F.3d at 518 (quoting **[**24]** *EEOC v. Metal Serv. Co.* 892 F.2d 341, 348 (3d Cir. 1990).) It is disputed as to whether Dr. Hussain made *any* "reasonable attempt" to convey interest in becoming Chief of the new Radiology Service. It appears that Dr. Hussain was focused mainly on maintaining the independence of the Radiation Therapy Service and becoming chief of that service. Hoping to forestall the merger altogether, Dr. Hussain may not have fully considered who would become chief of the merged service. Though plaintiff now contends he did want to be Chief of Radiology (Hussain Aff. P31), he does not produce evidence that he conveyed this interest to his superiors. Moreover, there is contrary evidence showing that plaintiff specifically stated that he did *not* want the position of Chief of Radiology. (Fletcher Dep. at 52.)

But even if plaintiff's assertions create a disputed issue of fact as to whether he "applied" for the position of Chief of Radiology, this dispute is immaterial given defendant's numerous legitimate, nondiscriminatory reasons for "pre-

[25]**
selecting" Dr. Barth to head the service. n12

The idea of merging the two services had been percolating among hospital administrators for some time prior to Mr. Garfunkel and Dr. Fletcher's assumption of their respective positions as Director and Chief of Staff. Administrators were concerned that Radiation Therapy was having problems scheduling patients and preparing for the accreditation review by the Joint Commission on Accreditation of Health Care Organizations, and that, as Acting Chief, Dr. Hussain was not "actively visible" or "correcting" the problems. (Garfunkel Dep. at 32.) On the other hand, Dr. Barth was "a very strong advocate" for the equipment and resource needs of his Service. (Fletcher Dep. at 42.) The goal of the merger was to "aid administrative efficiencies between the two related services and assist Radiation Therapy in becoming a stronger clinical unit." (Garfunkel Aff. P3). As stated by Mr. Garfunkel, "the final decision to merge the two services was based on the fact that Dr. Klemens Barth had done an excellent job running the large Radiology Service, would run the newly merged service, and was eminently qualified for the job." *(Id.)* In other words, the creation of the Radiology Service was conditional **[**26]** on Dr. Barth becoming chief.

Not only was Dr. Barth viewed as being far more capable than Dr. Hussain, if not "the best chief of radiology" that Dr.

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n12 The hospital administrators' reasons for making Dr. Barth chief go hand in hand with their reasons for effecting the merger. Thus, even if the merger were an adverse action, which it is not, plaintiff's discrimination claim fails unless he can show that these reasons are pretextual.

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Fletcher had seen at VAMC (Fletcher Dep. at 50), he already was in charge of the Imaging Service, which was "far larger in scope, workload, and personnel" than the Radiation Therapy Service. (Barth Aff. P 3.) At the time of the merger, the Imaging Service had ten times the budget of the Radiation Therapy Service and nine times as many practitioners. (Pl.'s Ex. W-I; Pl.'s Undisputed Facts P 28.)

In addition to these legitimate, nondiscriminatory reasons for selecting Dr. Barth without advertising the position, defendant states that even if Dr. Hussain had been a candidate for the position, they would not have selected him. (Def.'s Mot. at 8.) According to Dr. Fletcher, "[the hospital] would hope [the service chief] to **[*98]** be a person who has academic credentials, is able to, be a professor in their university, either Georgetown, G[eorge] W[ashington], or Howard, and is publishing on a regular basis as first author. And none of those criteria apply to Dr. Hussain." (Fletcher Dep. at 74.)

Defendant has more than met its burden of **[**27]** proferring a legitimate reason for selecting Dr. Barth as Chief of Radiology. It now falls to plaintiff to establish that the proffered reasons are a pretext for discrimination. n13 In

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n13 Though plaintiff focuses on Dr. Barth's "pre-selection" as evidence of the hospital's alleged scheme to undermine him," pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful. Indeed, where the selection is to be made from among a narrow band of current employees well known to the selectors, it is hard to see how there could not be a substantial degree of pre-selection--unless the decision-makers were asleep at the switch or they. candidates' track records were virtually identical." Kolstad
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trying to establish an inference of discriminatory intent, plaintiff disputes the hospital's characterization of his performance as Acting Chief of Radiation Therapy, claiming that the hospital is merely "blaming the victim. n14 (Pl.'s

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v. Am. Dental Assn, 329 U.S. App. D.C. 265, 139 F.3d 958, 969-70 (D.C. Cir. 1998), *vacated on other grounds by Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999). "Consequently, evidence of pre-selection is relevant only insofar as it logically supports an inference of discriminatory intent, i.e., trivially at best." *Id.* at 970. *See also Krodel v. Young*, 242 U.S. App. D.C. 11, 748 F.2d 701, 709 (D.C. Cir. 1984).

n14 Plaintiff argues:

The Agency has presented absolutely no evidence that the alleged *unidentified* 'problems' were caused, in any way, by Dr. Hussain. After refusing to allocate adequate funds to Dr. Hussain to hire any assistants or to purchase adequate equipment, and subjecting him to unbearable' responsibility for four and half years of running the department by himself, on call 24 hours a day, seven days per week, the Agency blames Dr. Hussain for the 'under-performance' of the Radiology Service.

(Pl.'s Opp'n. at 19-20.) But as noted by the Circuit Court, plaintiffs "responses constitute[] an argument that not withstanding those failings, the [defendant] should not have terminated [him] because there were extenuating circumstances. But courts are without authority to

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Opp. at 20.) Plaintiff misconstrues the legal standard. As unjust as the situation may seem to Dr. Hussain, the issue is not whether the hospital was *correct* in blaming the service's poor performance on plaintiff, but whether they truly believed that Dr. Barth would do a better job of turning the service around. "Once the employer has articulated a non-discriminatory explanation for its action, . . . the issue is not the correctness or desirability of [the] reasons offered [but] whether the employer honestly believes in the reasons it offers."

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second-guess an employer's personnel decision absent demonstrably discriminatory motive." *Waterhouse v. Dist. of Columbia*, 353 U.S. App. D.C. 205, 298 F.3d 989, 995 (D.C. Cir. 2002) (internal quotation marks and citations omitted.) n15 In that case, Aka's job qualifications were far superior to those of Valenzuela, the candidate selected for a hospital pharmacy technician job. *Id.* at 1299. Aka had nineteen years of experience handling pharmaceutical supplies, compared with Valenzuela's two months of volunteer work at a pharmacy. *Id.* at 1296-97. Aka had a master's degree in business and professional administration with a concentration in health service management, while Valenzuela had no college degree. *Id.* at 1297. Aka's credentials were sufficiently superior to those of the successful candidate to create a jury question as to whether the hospital's proffered reason for its decision was false.
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[29]**

Fischbach v. D.C. Dep't of Corr., 318 U.S. App. D.C. 186, 86 F.3d 1180, 1183 (D.C. Cir. 1996). As stated by the D.C. Circuit, "it is not enough for the plaintiff to show that a reason given for a job **[**28]** action is not just, or fair, or sensible. He must show that the explanation given is a phony reason." *Id.* (quoting *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994)). Thus, plaintiffs attempt to show that his superiors were wrong about his performance does nothing to prove that their proffered reasons for choosing Dr. Barth were a facade. *See Waterhouse v. Dist of Columbia*, 124 F. Supp. 2d 1, 7 (D.D.C. 2000) ("Plaintiffs perception of h[im]self, and of his work performance, is not relevant. It is the perception of the decisionmaker which is relevant.") (internal citation and quotation marks omitted), *aff'd*, *353 U.S. App. D.C. 205, 298 F.3d 989*, *353 U.S. App. D.C. 205, 298* F.3d 989 (D.C. Cir. 2002).

[30]**

[*99] Nor do plaintiffs assertions that he was more qualified than Dr. Barth because Dr. Barth lacked certification in "straight therapeutic radiology" or that "Dr. Barth came to the VAMC with no experience in Veteran's hospitals" raise an inference of pretext. In two opinions the D.C. Circuit has explained that, in a dispute involving relative job qualifications, discrimination will not be inferred absent a showing that plaintiffs qualifications are *far superior* to those of the successful candidate. For example, the Circuit noted:

> If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better qualified* for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate--something that employers do not usually do, unless some other strong consideration, such as

discrimination, enters into the picture. *Aka v. Wash. Hosp. Ctr.*, 332 U.S. App. D.C. 256, 156 F.3d 1284, 1294 (D.C. Cir. 1998) *(en banc)* (emphasis added). n15 In contrast, in *Stewart v. Ashcroft*, 359 U.S. App. D.C. 139, 352 F.3d 422 (D.C. Cir. 2003), there was no such **[**31]** evidence of *"stark superiority of credentials"* between plaintiff and the successful candidate for the position, of Chief of the Department of Justice's Environmental Crimes Section. *Id.* at 429-30 (emphasis added). Stewart had more prosecutorial experience in environmental matters, but Uhlmann -- the successful candidate -- also had signficant prosecutorial experience, with over twenty-five jury trials to his credit. *Id.* at 430. Stewart had two years of service as an Assistant United States Attorney, compared with Uhlmann's six months in that position. *Id.* The Circuit found that these "fine distinctions" were not sufficient to raise a jury question. *Id.*

Stewart's pointing to differences in qualifications that merely indicate a "close call" does not get him beyond summary judgment. This Court will not reexamine governmental promotion decisions where it appears the Government was

[33]**
faced with a difficult decision between two qualified candidates, particularly when there is no other evidence that race played a part in the decision.

Id.; *see also Edwards v. Principi*, 80 Fed. Appx. 950 (5th Cir. 2003) (to show pretext, "a plaintiff [must] **[**32]** show a difference in his qualifications superior to that of the person selected so apparent as to virtually jump off the page and slap us in the face") (internal citation and quotation marks omitted). In short, it falls to plaintiff "to address the issue of *discrimination*, not to quibble about the candidates' relative qualifications." *Skelton v. ACTION*, 668 F. Supp. 25, 26 (D.D.C. 1987) (emphasis in original), *aff'd*, 1988 U.S.

App. LEXIS 19286, No. 87-5353, 1988 WL 156306, at *1 (D.C. Cir. May 12, 1988).

As was the case in *Stewart*, plaintiff has failed to show "stark superiority of credentials" in comparison with the competition. *Stewart*, 352 F.3d at 429-30. Here, plaintiff's qualifications were not even equal to Dr. Barth's, let alone superior. Dr. Barth had served as manager of the significantly larger Imaging Service for several years, had published dozens of articles, and had several current university affiliations. **[*100]** (*Compare* Barth Aff. Attach. (Barth Resume) *with* Pl.'s Ex. P (Hussain Resume).) In terms of the hospital's criteria for chief of a large service, this was not even the "close call" that *Stewart* found insufficient to raise an inference of discrimination. *Stewart*, 352 F.3d at 430.

Plaintiff's remaining "evidence" of discriminatory intent is either irrelevant or incompetent. He asserts that another Muslim physician who had formerly worked closely with Dr. Fletcher repeatedly told him that Dr. Fletcher is a "racist." (Hussain Aff. P12.) He also "was told that" either Dr. Fletcher or Mr. Garfunkel "referred to Palestinian Muslims as 'uncivilized' and 'violent nomads'" at a meeting. (*Id.* at 16.) The Court can only rely **[**34]** on "competent" evidence to decide a motion for summary judgment. *Celotex Corp.*, 477 U.S. at 324. As these statements are nothing but hearsay, they do not create a triable issue of fact. Similarly, vague and conclusory statements cannot defeat summary judgment. Plaintiff refers to discriminatory "comments that he had personally heard [Dr. Fletcher and Mr. Garfunkel] make," but he provides no specifics. (*See* Hussain Aff. P16.) Moreover, "'stray remarks,' even those made by a supervisor, are insufficient to create a triable issue of discrimination where, as here, they are unrelated to an employment decision involving the plaintiff." *Simms v. U.S. Government Printing*

Office, 87 F. Supp. 2d 7, 9 n.2 (D.D.C. 2000).

Plaintiff also repeatedly makes reference to the discriminatory behavior of Dr. Patel, the staff physicist in the Radiation Therapy Service. (Pl.'s Opp'n at 4, 36; Pl.'s Stmt. of Undisp. Facts PP 16, 18.) n16 Plaintiff does not contend, however, that Dr. Patel had anything to do with the hiring or promotion decisions of hospital administrators. Thus, whether Dr. Patel was prejudiced against Muslims is irrelevant to plaintiff's claims of **[**35]** discriminatory nonselection. *Hall v. Giant Food, Inc.* 336 U.S. App. D.C. 63, 175 F.3d 1074, 1079 (D.C. Cir. 1999) (plaintiff cannot establish discriminatory motivation with evidence of one person's discriminatory remarks if that person is in no way involved with the decisionmaking process).

Plaintiff's attempts to link the alleged religion-based animus at the hospital to the promotion decisions of his superiors are also weakened by his inconsistent testimony during an EEO deposition. When asked what led him to believe that Dr. Barth's selection as chief was the result of discrimination, plaintiff replied, "I mean, that's only [sic] I can think of that, that it is racially motivated, you know, because I'm non-White and he's White." (Hussain Dep. at 143.) Guessing as to an employer's motivations does not provide the basis for a Title VII claim, **[**36]** for [plaintiff's mere speculations are 'insufficient to create a genuine issue of fact regarding [an

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n16 For instance, according to plaintiff, Dr. Patel "repeatedly criticized Dr. Hussain to coworkers for his belief in Islam." (Hussain Aff. P16.)

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employer's] articulated reasons for [its decisions] and avoid summary judgment.'" *Brody*, 199 F.3d at 459 (quoting *Branson v. Price River Coal Co.* 853 F.2d 768, 772 (10th Cir. 1988)).

In sum, plaintiff has not met his burden of showing pretext. Plainly, the merger was a way for the hospital to take ultimate responsibility for the Radiation Therapy Service out of Dr. Hussain's hands and put it into Dr. Barth's hands. However, there is no evidence to suggest that administrators made this decision on the basis of race, religion, or national origin. On the contrary, the hospital provides ample support **[*101]** for its claims that Dr. Barth was more qualified.

B. Nonselection as Chief of Radiation Therapy

The Court now turns to the hospital's nonselection of Dr. Hussain as Chief of Radiation Therapy. n17

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n17 Plaintiff attempts to frame his non-selection for the position of Chief of Radiation Therapy during the four and a half years that he served as Acting Chief (1997-2002) as a separate "adverse action" from the eventual selection of Dr. Manning for the position. However, to establish a prima facie case of discriminatory non-selection, plaintiff must show that "either someone filled the position or the position remained vacant and the employer continued to seek applicants." *Lathram*, 336 F.3d at 1088 (internal quotation marks and citations omitted). No one filled the position, nor did the employer seek any applicants, until Dr. Manning was appointed in December 2002. Plaintiff himself states that "Mr. Garfunkel and Dr. Fletcher chose to leave the position unfilled." (Pl.'s Opp. at 6.) Leaving Dr. Hussain as Acting Chief changed nothing about his employment situation and did not foreclose the possibility that he would become permanent chief at a later date. Thus, the Court concludes

|**39|
As noted above, to state a prima facie case plaintiff must show that: (1) he is a member of a protected class; (2) he applied for and was qualified for an available position; (3) despite his qualifications he was rejected; and (4) either someone filled |**37| the position or the position remained vacant and the employer continued to seek applicants.'" *Lathram*, 336 F.3d at 1088 (citations omitted). Defendant disputes that Dr. Hussain "applied for" the position at the time Dr. Manning was selected, viewing his "repeated requests to be made permanent Chief' merely as "veiled references to the position" and too remote in time to be relevant to Dr. Manning's appointment. (Def.'s Reply at 2.) n18 Viewing the evidence in the light most favorable to

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that plaintiff could not have suffered an adverse action until Dr. Manning was promoted to Chief of Radiation Therapy.

Plaintiff makes much of the fact that "VA regulations regarding probationary status limits an appointment to an Acting' position to 90 days; however, Dr. Hussain served in the capacity of Acting Chief for four and a half years." (Pl.'sOpp'n at 5.) Plaintiff, however, cites no regulation to this effect, and the Court's research has found none. Even if such a regulation does exist, it is irrelevant to whether plaintiff suffered an adverse action, where the key question is whether the employee suffered an "objectively tangible harm." *Brody*, 199 F.3d at 457.

n18 Defendant also disputes that Dr. Hussain was "qualified" for the position. (Def.'s Reply at 3.) As Acting Chief for four and half years, however, Dr. Hussain must have been at least minimally qualified for the position. At this stage, plaintiff need not show more.

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plaintiff, however, Dr. Hussain's expression of interest in this position was arguably sufficient to establish an "application." *See Cones*, 199 F.3d at 518. In April 1999 Dr. Hussain wrote to then Chief of Staff Dr. Spagnolo stating: "I am very much interested in the position of Chief, Radiation Therapy Service and I considered [sic] myself well qualified. Based on my service and qualifications I would like to be given a fair chance." (Pl.'s Ex. 0-2.) In 2000 he wrote another letter to Dr. Garfunkel also expressing interest in the position. *(See* Pl.'s Ex. 0-3.) In *Morgan*, an employee's expression of interest for a position in July was not sufficient to demonstrate **[**38]** that he had applied for the position again in November. 328 F.3d at 654. However, in that case, the Court noted that Morgan's employers were not aware that he still was interested in the position. *Id.* In contrast, there is evidence to suggest that plaintiff's superiors knew of his continued interest in becoming chief, but this issue need not be resolved, for plaintiff's claim fails for other reasons.

Assuming that plaintiff can state a prima facie case, the burden shifts to defendant **[*102]** to proffer a legitimate, nondiscriminatory reason for its employment action. The hospital's reasons for selecting Dr. Manning over Dr. Hussain for the position of Chief of Radiation Therapy are similar to those underlying the selection of Dr. Barth to be Chief of Radiology. "The hospital appointed Dr. Manning as chief of radiation therapy because she was competent and proficient in managing the staff. Hospital administrators knew Dr. Hussain to be ineffectual." (Def.'s Reply at 6; *see also* Fletcher Aff; Garfunkel Aff.) And in fact, at this point in time, administrators had even more reason to be concerned about Dr. Hussain's inadequate performance than they **[**40]** did at the time of Dr. Barth's appointment in 2000. A report from Dr. Krasnow (Chief of Oncology) to Dr. Fletcher in June 2002 revealed that although Dr. Hussain had a "fund of knowledge adequate to manage oncology patients

he rarely participates in conferences unless specifically asked a question his notes reveal minimum interaction [with patients] in most cases [and he] does not initiate any research proposals and offers no input into proposed trials." (Krasnow Aff. Att. (memo re: Clinical Services Provided by Dr. Hussain.) It also stated that, to Dr. Krasnow's knowledge, Dr. Hussain did not have a university appointment. Dr. Barth's July 2002 evaluation (approved by Dr. Fletcher) noted numerous problems with Dr. Hussain's performance, from record-keeping to punctuality to "heated verbal exchanges with his co-workers" n19 (Def.'s Ex. 2 at 3.) These types of concerns led Dr. Barth, in consultation with Dr. Fletcher, to appoint Dr. Manning as Chief of Radiation Therapy. *(See* Barth Aff.)

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n19 Plaintiff claims that this performance evaluation was prepared by Drs. Barth and Fletcher in retaliation for plaintiff's filing of an EEO claim. Even if this is arguably likely, which it is not, other evidence corroborates Dr. Barth's comments. *(See* Def.'s Ex. 2 at 8 (incident report re: outburst at meeting); Krasnow Aff; Manning Aff; Barth Aff.)

Plaintiff also makes much of the discrepancy between Drs. Fletcher and Barth's evaluation and those of Dr. Lunzer, his former supervisor. (Pl.'s Opp. at 27.) However, the fact that a previous manager found that plaintiff had met or exceeded expectations does not, by itself, establish that a subsequent manager's evaluation of employee's performance was discriminatory. *Cruse v. G&J USA Publ.*, 96 F. Supp. 2d 320, 329-30 (S.D.N.Y. 2000).

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[**41]
Defendant has met its burden of articulating a legitimate, nondiscriminatory reason for its failure to select Dr. Hussain for the position of Chief of Radiation Therapy, *i.e.*, that Dr. Manning was better qualified. The burden now shifts back to plaintiff to show that defendant's proffered reasons are pretextual. Plaintiff fails to carry this burden since he cannot show that he had credentials so superior to those of Dr. Manning as to raise an inference of discriminatory motive by either Dr. Barth or Dr. Fletcher.

Dr. Hussain cites his twenty-six years of experience at VAMC as compared with Dr. Manning's one and a half years, as evidence of pretext. n20 While this is indeed a stark contrast, it is not necessarily relevant to the two doctors' relative qualifications for the position of chief. *See* Horvath v. Thompson, 329 F. Supp. 2d. 1, 8 (D.D.C. 2004) (choosing employee with seven years experience over plaintiff, who had twenty years experience, was within selecting official's prerogative); *Park v. Washington Metro. Area Transit Auth.*, 892 F. Supp. 5 (D.D.C. 1995) (supervisor's decision based on capability rather than seniority did not raise inference of

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n20 He also refers repeatedly to the fact that Dr. Manning was at least ten years younger. Dr. Manning's age has no bearing on her qualification to be chief.
N21 Nor does the fact that Dr. Manning was certified only in Radiation Oncology whereas Dr. Hussain was certified in Radiology and Therapeutic Radiology, raise such an inference. Dr. Manning's certification was sufficient to qualify her to be Chief of Radiation Therapy.
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discrimination). Defendant demonstrates [**42] that Dr. Manning had been [*103] working in the field of radiation therapy since 1986, was affiliated with Georgetown Hospital, and was joint author of a number of publications. (Manning Aff, and Att. (Manning Resume).) Most importantly, Dr. Manning, had proven herself to be a capable administrator, whereas plaintiff had, in the hospital administration's view, had "a number of difficulties in managing and communicating" as Acting Chief. (Barth Aff. P4.) In light of these concerns, the choice between Dr. Manning and Dr. Hussain was not so obviously lopsided as to create an inference of discrimination under *Stewart* and *Aka*. n21 Viewing the evidence in the light most favorable to plaintiff, his superiors' decisions not to appoint him as either Chief of Radiation Therapy or Chief of Radiology were rooted in valid and documented concerns regarding his performance and not in any animus towards his race, religion, or national origin. No reasonable factfinder could conclude otherwise. Therefore, the Court grants summary judgment as to the plaintiff's claim of discrimination.

IV. Retaliation

Plaintiff also claims that Mr. Garfunkel, Dr. Fletcher, Dr. Barth, and Dr. Manning retaliated against him for filing EEO complaints in 2000 and 2001. (Pl.'s Opp'n at 25-32.) In order to establish *a prima facie* case of retaliation, plaintiff must demonstrate that: (1) he engaged in a statutorily protected activity; (2) the employer took an adverse personnel action; and (3) a causal connection existed between the two. *Brody*, 199 F.3d at 452. The legal standard for "adverse actions" is the same for a retaliation claim as for a discrimination claim. In other words, an "employment decision does not rise to the level of an actionable adverse action unless there is a

tangible change in the duties [**44] or working conditions constituting a material employment disadvantage." *Walker*, 102 F. Supp. 2d at 29. n22 With respect to the third prong, where an employer knew of the employee's protected activity, "very close" temporal proximity between a protected activity and an adverse action suffices to show a causal connection between the two. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-74, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (2001) (citing with approval cases finding temporal proximity of four and three months insufficient to demonstrate a causal connection); *Cones*, 199 F.3d at 521; *Broderick v. Donaldson*, 338 F. Supp. 2d 30, 2004 U.S. Dist. LEXIS 18910, 2004 WL 2166165, at *5 (D.D.C. Sept. 20, 2004). Once the requisite *prima facie* showing has been made, the same burden shifting analysis used for discrimination claims applies. *See Cones v. Shalala*, 339 U.S. App. D.C. 299, 199 F.3d 512 at 520-21.

[**45]
Plaintiff's filing of an internal EEO complaint on November 29, 2000 and a charge of employment discrimination with the EEOC on February 14, 2001 were protected activities, thereby satisfying the first prong. As to the second prong, plaintiff alleges a litany of adverse actions: (1) his nonselection for Chief of Radiology Therapy; (2) reporting

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n22 Plaintiff's claim that an adverse action is "any action reasonably likely to deter protected activity" is not the law in this Circuit. (Pl.'s Opp'n at 23.) Moreover, none of the cases cited by plaintiff to support this assertion deviates from the rule that an adverse action must affect the "terms and conditions of employment. *See, e.g., Drake v. Minn. Mining and Manuf. Co.*, 134 F.3d 878, 886 (7th Cir. 1998).
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to the [*104] NPDB; (3) denial of special pay; (4) denial of clinical privileges; (5) being subjected to "scrupulous[] monitor[ing];" (6) poor performance evaluations; (7) denial of medical leave; (8) "intentional delay in forwarding supervisor's letter for retirement purposes"; (9) "denial of counsel n23 and failure to provide written retirement options as requested;" and (10) "denial of access to official personnel file." n24 (Compl. P18.) Plaintiff repeats the special pay allegation in a separate paragraph entitled "Constructive Discharge; Denial of Special Pay." In his opposition, plaintiff additionally alleges (11) "Harassment/Threats of Termination" and (12) "Harassment/Fostering Insubordination" as retaliatory actions, although these are also included in plaintiffs hostile work environment claim. (Pl.'s Opp'n 28-29; Compl. at 14-17.) [**46]

Of these actions, only the nonselection, poor performance evaluations, and threats of termination are even arguably "adverse actions." Though reporting to the NPDB, denial of special pay, revocation of clinical privileges, or denial of medical leave might each be an adverse action in some circumstances, plaintiff misstates the undisputed facts underlying each of these claims. In fact, none of these four

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n23 Plaintiff alleges that HR personnel "refused to allow Dr. Hussain's legal representative to ask questions" during a meeting about his retirement options. (Pl.'s Opp'n at 32.)

n24 Plaintiff alleges that HR personnel could not produce his personnel file on one occasion when he requested it. Plaintiff does not allege that he asked for it repeatedly or even more than once.

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alleged retaliatory acts seems to have actually occurred. n25

[48]**

Plaintiff concedes that what he terms a "denial" of special pay was in fact the result of his own failure to renew his special pay contract. (Pl.'s Opp'n at 33; Hussain Dep. at 105-06.) He states that the contract was normally renewed automatically, but blames the problem in 2001 on Human Resources. *(Id.)* As to the actual subjects of the EEOC complaint, plaintiff alleges only that "both Mr. Garfunkel and Dr. Fletcher refused to assist Dr. Hussain in correcting this error." (Pl.'s Opp'n at 33.) Failure to assist an employee with an error of someone else's making (possibly the employee's own) cannot possibly be an adverse employment action.

Dr. Hussain's clinical privileges were modified in 2003, but not revoked. They were renewed for three months instead of

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n25 As discussed *supra* at pp. 3-4, the hospital referred plaintiff's name to the Peer Review Panel while recommending that he *not* be reported to the NPDB. The record clearly shows that plaintiff's name was cleared. (Pl.'s Ex. CC.) Plaintiff thus cannot use this action as a basis for a retaliation claim. *Walker*, 102 F. Supp. 2d at 29; *see also Stewart v. Evans*, 348 U.S. App. D.C. 382, 275 F.3d 1126 (D.C. 2002) (temporary humiliation or loss of reputation does not constitute an adverse employment action); *Dickerson v. SecTek, Inc.* 238 F. Supp. 2d 66, 80 (D.D.C. 2002) (temporary exclusion of employee from list of award recipients did not amount to adverse action).

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the normal two years. The hospital permitted him to continue practicing, but required him to provide documentation as to his interactions with patients. (Def.'s Ex. 4 at 7.) The documentation was considered necessary because the hospital had received complaints from patients, and Dr. Hussain's colleagues had observed that he did not seem to be providing adequate follow-up care. (Barth Aff.; Manning Aff.) Where "none of the restrictions relate[] to job responsibilities or job title and all appear rationally related to the explanation given for their imposition," restrictions imposed on an employee "do not amount to adverse employment actions." *Rabinovitz v. Pena*, 89 F.3d 482, 489 (7th Cir. 1996) (not permitting plaintiff to start work early in the morning, while allowing other employees to do so, was not adverse employment action where plaintiffs whereabouts were unknown for long periods of time.)
And, as the Court has already explained *supra* at pp. 6-7, plaintiff was not in fact "denied" medical leave, but failed to comply with Dr. Manning's request that he provide additional paperwork. Even if Dr. Manning's treatment of Dr. Hussain as being AWOL was an adverse action, plaintiff has not offered any evidence, or even any argument, of causal connection between this action and any protected activity.

Monitoring **[**47]** of an employee **[*105]** cannot be an adverse action since it is part of the employer's job to ensure that employees are safely and properly carrying out their jobs. This should be especially obvious in a hospital setting. Nor is failure to address "insubordination" of other employees an adverse employment action. The remaining three alleged retaliatory acts (# 8- # 10) are too *de minimis* to constitute adverse actions. n26 As such, the Court need only address the alleged "demotion," performance evaluations, and "threats of termination."

A. Demotion

Plaintiff alleges that "'on the heels' of Dr. Hussain's February 14, 2001 EEOC charge, Drs. Fletcher and Barth began a search for a doctor to replace him [and had hired Dr. Manning by June 2001.]" (Pl.'s Opp'n at 25.) [7] Temporal proximity between an employer's action and the employee's protected activity is, however, only relevant if the employer's conduct amounts to an "adverse action". As defendant correctly notes, "plaintiff has failed to **[**49]** adequately explain how the hospital's hiring of another [staff] physician in radiation therapy to assist with the workload of the department could possibly be construed as somehow detrimental to Dr. Hussain." (Def.'s Reply at 7.) Plaintiff states, "Dr. Barth specifically sought an African-American doctor to fill the newly created staff physician position as a means of weakening Dr. Hussain's November 2000 EEO Charge," and that Dr. Barth only seriously considered African-American applicants for the position. (Pl.'s Opp'n at 14.) Finding this conduct to qualify as an adverse action on the basis plaintiff suggests would have the perverse result that employers could be sued under Title VII for recruiting

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n26 Title VII is not meant to remedy "minor and even trivial employment actions," such as a delay in paperwork. *Russell v. Principi*, 347 U.S. App. D.C. 222, 257 F.3d 815 at 818 (2001). On the contrary, "the objectively tangible harm requirement guards against both judicial management of business practices and frivolous suits over insignificant slights." *Id.* (internal quotation marks and citations omitted). Furthermore, the supposed "retaliatory" actions were taken by the HR department, not the alleged discriminating officials -- Drs. Barth, Manning, Fletcher and Mr. Garfunkel.

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and hiring minority applicants subsequent to the filing of an EEOC charge of discrimination.

Unlike her initial hiring in the fall of 2001, Dr. Manning's promotion to the position of Chief of Radiation Therapy in December 2002 is, as previously held, an adverse employment action. Although it did not affect Dr. Hussain's (or Dr. Manning's) pay or grade, losing responsibility for leading the department was arguably a material change in Dr. Hussain's working conditions. *See* Burke v. Gould, 351 U.S. App. D.C. 1, 286 F.3d 513, 522 (D.C. Cir. 2002) **[**50]** ("We have no doubt that the removal of [plaintiff's] supervisory responsibilities constituted an adverse employment action.").

Plaintiff next must show a causal connection between his protected activity and Dr. Manning's promotion to chief. Since the promotion occurred in December 2002 and plaintiff's original protected activity occurred on February 14, 2001, there is a serious question as to whether plaintiff can show a causal connection based on temporal proximity. *Clark County School Dist.*, 532 U.S. at 273 (requiring "very close" temporal proximity). Under *Singletary v. Dist. of Columbia*, the inquiry into temporal proximity is not limited to the date of the original filing of a discrimination-related action, but can extend to "ongoing pursuit of discrimination claims." 359 U.S. App. D.C. 1, **[*106]** 351 F.3d 519, 525 (D.C. Cir. 2003). Since plaintiff was still pursuing his claims in 2002, he may be able to establish a causal connection. (*See* Pl.'s Ex. 00 (Sept. 16 2002 letter from Dr. Barth to Dr. Hussain re: hiring of counsel).) However, even assuming that plaintiff could do so, his claim must be rejected.

The Court has already concluded in relation to plaintiffs **[**51]** discrimination claim that the hospital has proffered a legitimate, nondiscriminatory reason for this

action. The burden shifts back to plaintiff to show that this reason was pretext for retaliation. But as previously established *(see* Section II.B), he has not done this. n27

[**52]

B. Poor Performance Evaluations

Plaintiff alleges that after he filed his February 2001 EEOC Charge he received his "first negative evaluation in twenty-six years of service." (Hussain Aff. P62.) Dr. Hussain's 2001

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n27 Dr. Hussain and Dr. Fletcher had a heated exchange that seems to have resulted, at least in part, from Dr. Hussain's EEO activities. Plaintiff alleges that during the last week in December 2000, Dr. Fletcher "came down very angry" and told him: "you are not going to tarnish my image by doing this." (Hussain Dep. at 50.) However, plaintiff does not draw a connection between this event and his alleged "demotion." Even if Dr. Fletcher was angry about the EEO proceedings, plaintiff has not offered sufficient evidence to show that the appointment of Dr. Manning was based on retaliation rather than her performance in comparison to Dr. Hussain's. *See, e.g.*, *Carpenter v. Fannie Mae*, 335 U.S. App. D.C. 395, 174 F.3d 231, 234, 237 (D.C. Cir. 1999) (finding that employer's admonition to plaintiff complaining of discrimination to drop her complaint and statement that plaintiff should not "cut off her nose to spite her face" did not rebut the legitimate explanation offered to counter plaintiffs relation claim).

n28 Although Dr. Manning took his place as chief a few months later, this change was not dependent on the poor performance evaluation, but on Dr. Barth's own assessment of Dr. Hussain's capabilities. (Barth Aff. P 4.)

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performance evaluation in fact rated him as "satisfactory." (Pl.'s Ex. NN-2.) The D.C. Circuit has held that "in most circumstances performance evaluations alone at the satisfactory level or above should not be considered adverse employment actions." *Russell v. Principi*, 347 U.S. App. D.C. 222, 257 F.3d 815 (D.C. Cir. 2001); *see Childers v. Slater*, 44 F. Supp. 2d 8 at 20 (1999) ("the fact that a plaintiff receives a lower performance evaluation than she thought she deserved does not constitute adverse action sufficient to make a prima facie case of discrimination and reprisal.") Even performance evaluations that are unequivocally negative are not "necessarily adverse actions." *Brody*, 199 F.3d at 458 (no prima facie case where a poor performance evaluation affected neither the plaintiff's grade or salary.) Given the absence of any showing that his "low satisfactory" rating in 2002 affected plaintiff's conditions of employment, n28 **[**53]** this is not an adverse action.

C. "Threats of Termination"

Plaintiff alleges that Dr. Barth "made numerous threats to Dr. Hussain regarding his employment." (Pl.'s Opp'n at 29.) Specifically, he "asked Dr. Hussain to quit" and told Dr. Hussain he would be "'kept in a box.'" *(Id.)* The only support provided by plaintiff for these assertions is his own affidavit. (Hussain Aff. P65.) Even assuming Dr. Hussain is accurately reporting the conversations, they do not constitute adverse actions. For verbal "comments to rise to the level of adverse action, the conduct must be so egregious as to alter the conditions of employment." *Henry v. Guest Servs.*, 902 F. Supp. 245, 252, n. 9 (D.D.C. 1995); *see generally, Rabinovitz*, 89 F.3d at 489 (employer's comment **[**54]** that plaintiff could quit if unhappy with the job did not constitute a constructive **[*107]** discharge); *Williams v. City of Kansas City*, 223 F.3d 749, 754 (8th Cir. 2000) (ostracism does not rise to the level of an actionable adverse action).

In sum, the only alleged retaliatory act that could arguably rise to the level of an adverse action is Drs. Barth and Fletcher's appointment of Dr. Manning as Chief of Radiation Therapy in 2002. Since plaintiff cannot make out a claim of retaliation based on this act, summary judgment must be granted on this claim.

IV. Hostile Work Environment

A hostile work environment exists when workplace conditions are so suffused with "discriminatory intimidation, ridicule and insult" of such "sever[ity] or pervasive[ness] as to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993) (internal quotation marks and citations omitted); *see Holbrook v. Reno*, 196 F.3d 255 (D.C. Cir. 1999). To make out such a claim, it is not enough to merely show harassment, for "Title VII does not [**55] prohibit all forms of workplace harassment, only those directed at discrimination because of sex [, race, religion, or national origin]." *Stewart v. Evans*, 348 U.S. App. D.C. 382, 275 F.3d 1126, 1133 (D.C. Cir. 2002). Moreover, "casual or isolated manifestations of a discriminatory environment" may not raise a cause of action. *Park v. Howard University*, 315 U.S. App. D.C. 196, 71 F.3d 904, 906 (D.C. Cir. 1995).

Plaintiff also cannot make out a claim for hostile work environment. There is no basis for inferring that any allegedly disparaging conduct by the defendant was based on plaintiff's race," religion, or national origin, or that the allegedly hostile treatment was so severe or pervasive as, "to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive ." *Harris*, 510 U.S. at 21, 23 (must consider its severity, whether it is physically threatening or humiliating

and whether it unreasonably interferes with an employee's work performance).

IV. Constructive Discharge

Plaintiff also contends that VAMC officials created working conditions **[**56]** so hostile and intolerable that he was compelled to resign. (Compl. at 18.) "A plaintiff who advances such a compound [hostile-environment constructive discharge] claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 159 L. Ed. 2d 204, 124 S. Ct. 2342 (2004). Furthermore, "the working conditions must be more than merely intolerable; they must be intolerable in a discriminatory way." *Chambers v. Am. Trans Air* 17 F.3d 998, 1005-06 (7th Cir. 1994). "Constructive discharge thus requires a finding of discrimination and the existence of certain 'aggravating factors.'" *Mungin v. Katten Muchin & Zavis*, 325 U.S. App. D.C. 373, 116 F.3d 1549, 1558 (D.C. Cir. 1997) (quoting *Clark v. Marsh*, 214 U.S. App. D.C. 350, 665 F.2d 1168 at 1174); *see also Dashnaw v. Pena*, 12 F.3d 1112, 1115 (D.C. Cir. 1994). The Court has already concluded that plaintiff cannot make out a case of discrimination. Thus, summary judgment must also be granted on the constructive discharge claim.

CONCLUSION

For the foregoing reasons, defendant's motion **[**57]** for summary judgment is granted and plaintiff's complaint is dismissed with prejudice. A separate Order is attached to this Memorandum Opinion.

s/

ELLEN SEGAL HUVELLE

United States District Judge

[*108] ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED defendant's motion for summary judgment [# 26] is **GRANTED** ; and it is

FURTHER ORDERED that this case is dismissed with prejudice.

This is a final appealable order.

s/

ELLEN SEGAL HUVELLE

United States District Judge

Date: October 28, 2004

ADDENDUM

Statutes

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

It shall be an unlawful employment practice for an employer…

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms and conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides:

It shall be an unlawful employment practice for an employer …

to discriminate against any of his employees or applicants for employment …because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(2)

No. 06-83

FILED
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SUPREME COURT, U.S.

In the Supreme Court of the United States

MOHAMMED HUSSAIN, PETITIONER

v.

JIM NICHOLSON, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the courts below correctly awarded summary judgment against petitioner on his claims that he was subjected to actionable discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 4, 5, 7

In the Supreme Court of the United States

No. 06-83

MOHAMMED HUSSAIN, PETITIONER

v.

JIM NICHOLSON, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 435 F.3d 359. The memorandum opinion of the district court (Pet. App. A18-A59) is reported at 344 F. Supp. 2d 86.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2006. A petition for rehearing was denied on April 19, 2006. The petition for a writ of certiorari was filed on July 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Mohammed Hussain, an Indian Muslim, served as a physician at the Washington, D.C. Veterans Affairs Medical Center from 1978 until 2003. Pet. App. A20, A26. He held the position of Assistant Chief of Radiation Therapy until 1997, at which point his supervisor retired and he was appointed Acting Chief of the Radiation Therapy Service. *Id.* at A20. Although not accompanied by a pay raise, that new role entailed additional administrative duties. In addition, as Acting Chief, petitioner reported directly to the hospital's Chief of Staff, Ross Fletcher. *Ibid.* Petitioner sought to make his appointment permanent, but the hospital declined to do so. *Id.* at A21.

In September 2000, the hospital decided to merge the Radiation Therapy Service with the Imaging Service. Pet App. A21. The merger caused petitioner's unit to lose its status as an independent "service," instead becoming a "division" within the newly formed Radiology Service. *Ibid.* The hospital also decided to appoint the current Chief of the Imaging Service, Klemens Barth, as head of the Radiology Service. *Ibid.* As a result, while petitioner retained his title, pay, and job responsibilities, he now reported to Dr. Barth, rather than reporting directly to Dr. Fletcher. *Ibid.*

On November 29, 2000, petitioner filed an informal Equal Employment Opportunity complaint. Pet. App. A21. He alleged that the hospital had discriminated against him on the basis of race, age, religion, and national origin by (1) failing to permanently appoint him Chief of Radiation Therapy, and (2) effectively demoting him in the merger. *Id.* at A21-A22.

In January 2001, the hospital referred petitioner to a Veterans Administration "Peer Review Panel" to address his possible involvement in events that had resulted in a malpractice claim against the hospital. Pet. App. A22. Dr. Fletcher submitted a letter in petitioner's defense, and the panel found that petitioner had not deviated from the appropriate standard of care. *Id.* at A22-A23. The panel therefore decided not to report petitioner to a national malpractice database. *Ibid.*

On February 14, 2001, petitioner filed a formal charge of employment discrimination with the Equal Employment Opportunity Commission. Pet. App. A23. He reasserted the allegations of his previous informal complaint, and further alleged that the hospital had submitted his name to the Peer Review Panel in retaliation for that earlier filing. *Ibid.*

Meanwhile, reorganization at the hospital continued. In July 2001, the hospital hired an African American woman, JoAnn Manning, as a Radiation Therapy staff physician. Pet. App. A23. In December 2002, the hospital appointed Dr. Manning as Chief of Radiation Therapy, and returned petitioner to his previous title of Assistant Chief. *Id.* at A24. While some of his administrative responsibilities shifted to Dr. Manning, petitioner's compensation and duties did not change. *Ibid.*

In between Dr. Manning's hiring and her promotion, petitioner had received two unfavorable performance reviews from the hospital. The first, in October 2001, rated petitioner as "satisfactory" and stated that "many issues have arisen regarding [petitioner]." Pet. App. A24. The second, in August 2002, rated petitioner "low satisfactory" and stated that petitioner had failed to "provide effective leadership for the division." *Ibid.* In February 2003, petitioner filed suit against the hospital

in the United States District Court for the District of Columbia, raising a variety of claims, including claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. A4, A26.

In June 2003, the hospital became concerned that petitioner had been failing to conduct adequate follow-up evaluations with his patients. Pet. App. A24-A25. The hospital therefore renewed petitioner's clinical privileges for only three months, as opposed to the typical two years. *Id.* at A25. The hospital also began to require special documentation and review of petitioner's patient visits. *Ibid.* Based on that review, the hospital became concerned that petitioner was simply copying other physicians' diagnoses without independently confirming them. *Ibid.*

In August 2003, the hospital informed petitioner, then on medical leave, that it would extend his clinical privileges for one month, but that he would be required to fully comply with standard treatment protocols. Pet. App. A25. Petitioner sought permission to extend his medical leave, and provided the hospital with a doctor's note stating that his emotional state would not allow continued exposure to the hospital's "very stressful work environment." *Id.* at A25-A26. The hospital informed petitioner that it would not approve his request to extend his leave without additional medical documentation, and subsequently placed him on "Absent Without Leave" status. *Id.* at A26. In September 2003, petitioner opted for early retirement. *Ibid.*

2. In November 2003, petitioner filed a second amended complaint, narrowing the scope of his suit to only Title VII claims. Pet App. A4, A26. He alleged that the hospital had failed to promote him based on race, religion, and national origin; that he had been sub-

ject to a hostile work environment; that he had been retaliated against for protected activity; and that he had been constructively discharged. *Id.* at A4. The district court set aside a six-month window for discovery, but petitioner failed to take any discovery during that period. *Ibid.*

In June 2004, after the close of discovery, the government filed a motion for summary judgment. Pet. App. A26. More than one month later—and three and a half months after discovery had closed—petitioner, represented by new counsel, moved to reopen discovery. *Id.* at A26-A27. Finding that the lack of discovery was due to the neglect of petitioner's prior counsel, the court denied the motion. *Ibid.*

The district court subsequently granted the government's summary judgment motion. Pet. App. A18-A59. The court examined at length the evidence relating to petitioner's Title VII claims. *Id.* at A28-A58. Regarding his failure to promote claims, the court found that, "[v]iewing the evidence in the light most favorable to [petitioner]," the hospital's "decisions not to appoint him as either Chief of Radiation Therapy or Chief of Radiology were rooted in valid and documented concerns regarding his performance and not in any animus towards his race, religion, or national origin." *Id.* at A48. The court also found no basis for his hostile work environment and constructive discharge claims. *Id.* at A57-A58.

The district court also rejected petitioner's claim that he had been subjected to 12 acts of retaliation.[1] The

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[1] The 12 acts alleged were: (1) "nonselection for Chief of Radiology Therapy," (2) reporting petitioner to a national malpractice database, (3) "denial of special pay," (4) "denial of clinical privileges," (5) subjecting petitioner to "scrupulous monitoring," (6) "poor performance evaluations," (7) "denial of medical leave," (8) "intentional delay in

court found that 11 of the alleged retaliatory acts did not rise to the level of adverse employment actions, and that four of those 11 had not actually occurred as petitioner claimed. See Pet. App. A50-A57. In a footnote, the district court rejected, as contrary to circuit law, petitioner's contention that "an adverse action is 'any action reasonably likely to deter protected activity.'" *Id.* at A49 n.22. As for the final alleged retaliatory act—promoting Dr. Manning over petitioner—the court determined that petitioner could not show that the hospital's proffered legitimate, nondiscriminatory reasons were pretexts for retaliation. *Id.* at A54-A55.

3. Petitioner appealed both the denial of his motion to reopen discovery and the grant of summary judgment in favor of the government. The court of appeals concluded that the district court's discovery ruling was not an abuse of discretion, because the necessity for the continuing discovery was primarily due to the lack of diligence by petitioner's original attorney. Pet. App. A8. As the court explained, "a party who voluntarily chooses his attorney 'cannot . . . avoid the consequences of the acts or omissions of this freely selected agent.'" *Ibid.* (citation omitted).[2]

The court of appeals also agreed with the district court that summary judgment was proper, because plaintiff "failed to present any triable Title VII claims."

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forwarding supervisor's letter for retirement purposes," (9) failing to provide written retirement options and denying petitioner's counsel the opportunity to ask questions at a retirement meeting, (10) "denial of access to official personnel file," (11) "Harassment/Threats of Termination," and (12) "Harassment/Fostering Insubordination." Pet. App. A49-A50 & n. 23 (internal alterations omitted)

[2] Judge Rogers concurred on the separate ground that petitioner could not show sufficient prejudice. Pet. App. A13-A17.

Pet. App. A13. With respect to petitioner's retaliation claims, the court of appeals specifically noted that petitioner had not directly challenged the district court's determination that none of the 12 acts of retaliation he had alleged was actionable. *Id.* at A11-A12. Instead, petitioner had elected to argue on appeal that "the twelve alleged retaliatory acts, when combined, created a hostile work environment and constituted constructive discharge." *Id.* at A12. The court of appeals determined that no reasonable jury could reach such a conclusion and that summary judgment was therefore warranted on that claim. *Id.* at A12-A13.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that the court of appeals' decision conflicts with *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). That contention is without merit and does not warrant review. *Burlington Northern* has no bearing on any issue that petitioner presented to the court of appeals or that was decided by that court.

In *Burlington Northern*, the Court held that Title VII's anti-retaliation prohibition is not limited to employment actions that affect the terms and conditions of employment. 126 S. Ct. at 2412-2413. Rather, the anti-retaliation prohibition extends to any action that a "reasonable employee would have found" to be "materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (internal quotation marks and citation omitted).

Petitioner contends that the court of appeals' decision conflicts with *Burlington Northern* because "[u]nder *Burlington*, the enumerated acts that the Court of

Appeals deemed not to be adverse actions within the meaning of Title VII are now actionable." Pet. 10. In fact, however, the court of appeals made no determination on whether the individual acts alleged by petitioner amounted to actionable retaliation, because petitioner failed to raise that issue on appeal. See Pet. App. A11-A12 (noting that the district court had made findings with respect to those acts, but that petitioner had declined to "respond[] to these findings directly"). Petitioner instead elected to advance an alternative theory of retaliation on appeal: that even if the alleged acts were not individually actionable, "when combined, [they] created a hostile work environment and constituted constructive discharge." *Ibid.*; see Pet. C.A. Br. 42 ("The Trial Court Erred by Failing to Recognize [petitioner's] Hostile Work Environment and Constructive Discharge Claims, based on Retaliation."); *id.* at 42-47 (stating that "[a]n adverse action is defined as 'any action reasonably likely to deter protected activity,'" but failing to argue that the district court erred in finding that individual retaliatory acts alleged by petitioner were not adverse actions). The court of appeals rejected petitioner's alternative theory, concluding that petitioner failed to establish that the acts at issue created a hostile work environment. Pet. App. A12.

Nothing in *Burlington Northern* calls into question the court of appeals' hostile work environment ruling. *Burlington Northern* addressed only the standard for proving retaliation; it did not address the standard for proving a hostile work environment. To the extent that petitioner seeks to challenge as inconsistent with *Burlington Northern* the district court's determinations on the alleged individual acts of retaliation, petitioner's decision not to challenge those findings on appeal pre-

cludes him from raising the issue for the first time in this Court. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (when an issue was neither properly presented nor passed on below, review should be denied); *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001). Because nothing in the court of appeals' decision conflicts with *Burlington Northern*, and petitioner waived any contention that the district court's decision conflicts with *Burlington Northern*, review of petitioner's first question is not warranted.

2. The remaining questions that petitioner seeks to present concern case-specific issues that also do not warrant review. Petitioner argues (Pet. 11-21) that the courts below failed to apply or violated various precedents of this Court. But those arguments consist of nothing more than assertions that either the court of appeals or the district court did not consider or did not properly weigh particular pieces of evidence. Such fact-bound assertions clearly do not warrant review.

Petitioner also contends (Pet. 25-30) that the district court exhibited bias in failing to allow additional discovery. As the court of appeals explained, however, the district court did not abuse its discretion in declining to extend the discovery deadline when the primary basis for doing so would have been that petitioner's former counsel was negligent in failing to conduct discovery. Pet. App. A8. Petitioner points to no evidence that the district court was biased against him in making that ruling, and, as Judge Rogers explained, petitioner has failed to show that he was unfairly prejudiced by the district court's discovery ruling. *Id.* at A16-A17. In any event, that fact-bound question does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARLEIGH D. DOVER
Attorney

SEPTEMBER 2006

(3)

No. 06-83

Supreme Court U.S.
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In the Supreme Court of the United States

MOHAMMED HUSSAIN,

Petitioner,

v.

R. JAMES NICHOLSON, SECRETARY,
DEPARTMENT OF VETERAN'S AFFAIRS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Dawn V. Martin, Esquire
D.C. Federal Bar No. 412384
Law Offices of Dawn V. Martin
1725 I Street, N.W., Suite 300
Washington, D.C. 20006
(202) 408-7040 telephone
(703) 642-0208 facsimile

Counsel for Petitioner

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

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ARGUMENT

I. Dr. Hussain Consistently Argued, in the District Court and Court of Appeals, that each Enumerated Act Constituted a Retaliatory Adverse Action

On pages 8-9 of its *Opposition*, the VA disingenuously claims that Dr. Hussain raised, "*for the first time,*" at the Supreme Court level, the argument that the individual enumerated acts that the Agency took against him were "adverse actions" within the meaning of Title VII; however, Dr. Hussain has consistently made this argument at both the district court and the Court of Appeals.

Dr. Hussain has consistently asked both the district court and the Court of Appeals to adopt and apply the definition of adverse action eventually adopted by this high Court in *Burlington v. White*, 126 S.Ct. 2405 (2006) (decided June 22, 2006). As discussed in Dr. Hussain's *Petition for Cert.*, at 9, the enumerated acts that the Court of Appeals deemed not to be adverse actions within the meaning of Title VII are now actionable.[1]

This case provides this Court with a vehicle for interpreting *Burlington* with respect to fifteen different individual employer actions. Addressing so many specific and fairly common employer practices in one case will provide guidance for courts faced with the question of whether one or more of the same employer acts constitute adverse actions in retaliation for protected activity under Title VII.

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[1] These actions include Dr. Hussain's: 1) demotion; 2) sudden poor performance evaluations; 3) report to the National Malpractice Data Bank; 4) denial of union representation; 5) threats of termination; 6) fostering insubordination toward Dr. Hussain, at the risk of endangering patient safety; 7) excessive monitoring; 8) suspension/restriction of clinical privileges; 9) withholding of retirement/disability retirement papers necessary to timely obtain retirement income; 10) denial of counsel and failure to provide retirement options in writing; and 11) denial of access to personnel file.

*A. **District Court***

On pages 5-6 of its *Opposition*, the Agency admits that that Dr. Hussain raised the issue of individual adverse actions at the district court level: "[t]he district court found that 11 of the alleged retaliatory acts did not rise to the level of adverse employment actions...." In his *Opposition to Defendant's Motion for Summary Judgment*, pages 23-33, Dr. Hussain listed, and discussed in detail, 15 individual retaliatory acts committed against him by the Agency constituted individual adverse actions.

B. ***Court of Appeals***

1. ***Dr. Hussain's March 14, 2006 Petition for Rehearing and March 30, 2006 Supplement***

On March 14, 2006, Dr. Hussain filed a *Petition for Rehearing, or for Rehearing, En Banc*. Dr. Hussain asked the Court to reconsider its decision affirming the district court's decision for several reasons, including the fact that the law in the D.C. Circuit had changed. The D.C. Circuit had issued several decisions changing, clarifying, expanding and redefining an actionable "adverse action" within the meaning of retaliation claims brought under Title VII. Beginning with its January 10, 2006 decision in *Holcomb v. Powell*, 433 F. 3d 889 (D.C. Cir. 2006) (Jan.10, 2006),[2] the D. C. Circuit's definition of "adverse action" directly conflicted its own decision in *Hussain*. *Cert. Petition*, at 7-11; *Rehearing Petition at* 3-6. The court further expanded the definition of adverse actions after *Holcomb* with *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006) (February 28, 2006) and *Chappelle-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006) (March 17, 2006). See *Cert. Petition*, at 7-9. In

[2]Interestingly, Judge Rogers was on both the *Holcomb* and *Hussain* panels; yet these cases were inconsistently decided. *Hussain* failed to cite *Holcomb* or to otherwise acknowledge the new, expanded definition of adverse actions adopted, by the same Court, two weeks earlier, in *Holcomb*.

his *Petition for Rehearing*, at 3-6, and *Supplement*, Dr. Hussain argued that this new D.C. Circuit case law required the reversal of the Panel's decision in *Hussain*. The Court declined to rehear the case; however, Dr. Hussain certainly argued the issue, with updated case law, before the Court of Appeals.

2. December 5, 2005 Oral Argument

Dr. Hussain could not cite *Burlington, Holcomb, Rochon or Chappelle-Johnson* in his Appellate *Briefs* or oral argument because they had not yet been decided; however, Judge Tatel specifically engaged counsel in a discussion about whether Dr. Hussain had abandoned his argument that the enumerated retaliatory acts listed in his motion for summary judgment were adverse actions. Tr. 12-15. Judge Tatel asked, "You are challenging, you are claiming each of those is, by itself, sufficient to be retaliatory?" Counsel answered, "Yes...." Judge Tatel asked for references to his *Brief* and counsel provided them, selecting examples of the individual acts that constituted adverse actions alone. *Id.*

3. ***Appellate Briefs***

Even in its own Appellate Brief, the Agency framed one of the "*Issues Presented*," as "Whether the District Court correctly found that the appellant failed to establish *adverse personnel actions*." (Emphasis added) The Agency has therefore admitted that this was an issue before the Court of Appeals.

Dr. Hussain cited and discussed cases that supported his argument that the individual acts that the Agency took against him constituted adverse actions. Hussain Brief, at 43-47. Dr. Hussain also argued that he was required to present evidence sufficient to create a genuine issue of disputed fact as to "whether the Agency's actions against Dr. Hussain constituted adverse actions, within the definition of Title VII. Hussain Reply Brief, at 3-4. The Agency's argument that Dr. Hussain has waived his right to now argue

this issue before this Court is based on a gross misrepresentation of the record.

II. The Agency has Misrepresented Material Facts

A. The Agency Misrepresents Dr. Hussain's Rejection and Demotion as a "Reorganization"

On page 3 of its *Brief in Opposition* (*Opposition*), the Agency contends that, after Dr. Hussain filed his February 14, 2001 EEO charge, -"reorganization at the hospital continued;" however, there was no reorganization. Within a year after Dr. Manning's hire, the hospital promoted her to the Chief position that Dr. Hussain had been filling, on an Acting basis, for four and a half years.[3] The hospital demoted Dr. Hussain from his Acting Chief position to being Dr. Manning's Deputy. This was not"reorganization;" rather, it was a demotion for Dr. Hussain and a rejection of him for a promotion. Even if it was a reorganization, it was a retaliatory adverse action, designed to demote Dr. Hussain.

B. The Agency Misrepresents Dr. Hussain's "Cutting and Pasting" of Patient Histories and Test Results as a Failure to Diagnose Patients

On page 4 of its *Opposition*, the Agency states that, based on required "special documentation and review of petitioner's patient visits" imposed on Dr. Hussain by the hospital, the hospital "became concerned that petitioner was simply copying other physicians' diagnoses without independently confirming them." This is the first time that the Agency has indicated that Dr. Hussain had a duty to diagnose, or to confirm the radiologists' "diagnoses." The Agency cites the Appendix, page 25, which is the d*istrict court* decision, which states:

> Upon review of the required documentation in August 2003, Dr. Barth and Dr. Manning found "an

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[3] The Agency violated Section 5 U.S.C. § 3341 by keeping Dr. Hussain in an Acting position beyond 120 days.

> alarming pattern that Dr. Hussain finds it appropriate to copy and paste other physicians [sic] assessment into electronic patient record without giving evidence that he has actually seen and examined the patient prior to, during, or after treatment." (Def's Ex. 4 at 5.)

Dr. Hussain was a *therapeutic* radiologist. His job was to *treat* cancer, *not to diagnose* it. Dr. Hussain treated patients after they had been diagnosed. Dr. Hussain's job description did not include diagnosis of patients and *his clinical privileges did not permit him to diagnose.* If he had diagnosed patients, *he would have been mal-practicing.*[4]

Dr. Hussain has repeatedly explained that he electronically "cut and pasted" patient histories, including test results. The Agency has never disputed Dr. Hussain's repeated assertion that the electronic "cutting and pasting" of patient histories is the standard practice among physicians at the hospital and in other medical facilities. The patient diagnosis depends upon pathology reports and other related diagnostic procedures. These *past* test results do not change.

Once the patient was diagnosed, it was Dr. Hussain's decision whether to treat the patient with radiation therapy, surgery and/or chemotherapy. Dr. Hussain had to inform the patient of the options available and the consequences of each cancer treatment, in order to obtain the patient's informed consent to any treatment. Dr. Hussain also had to make decisions as to whether additional or new treatments should be administered. He had to discuss the progress and options of treatment with the patient at each stage.

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[4] Although it was not Dr. Hussain's job to diagnose, unlike Drs. Barth, Manning, or any other radiologist at the hospital, Dr. Hussain was trained and certified in both diagnostic and therapeutic radiology. He could understand the pathology reports, integrate the information into the treatment, detect errors in diagnoses and/or reading pathology reports and bring those errors to the attention of the diagnostician.

In order to properly inform his patients, Dr. Hussain had to continue his own education on new procedures.[5] All of this information was in the patient charts, which are in the exclusive control of the hospital. Dr. Hussain had no opportunity to obtain these records because he was erroneously denied discovery. (See *Petition*, at 21-30). The hospital has never alleged that Dr. Hussain failed to obtain informed consent or that he left a patient untreated. The Agency has never alleged that a patient claimed that a patient denied seeing Dr. Hussain when his record indicated that he had treated the patient. The hospital did not produce even one patient chart[6] to substantiate its claims of inaccurate record keeping; yet, Judge Huvelle adopted the Agency's completely *unsubstantiated allegation* as fact.

The Court of Appeals recognized that Judge Huvelle ignored Dr. Hussain's exhibits, including Agency memoranda and minutes of meetings, rebutting the Agency's specific allegations of poor performance by Dr. Hussain, including its claims that Dr. Hussain "failed to hire necessary staff, correct personnel problems, and request important equipment." 435 F. 3d at 365 (D.C. Cir. 2005) (*See also Petition*, at 18). The Agency has made misrepresentations regarding Dr. Hussain's patient records in the hope that the courts, non-medical personnel, can be confused into believing that Dr. Hussain falsified records and/or neglected patients. Indeed, despite the Court of Appeals conclusion that Dr. Hussain "was a better candidate than the hospital

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[5] For example, Dr. Hussain obtained training in brachytherapy and to institute this prostate cancer treatment at the hospital.

[6] Although patient charts are confidential medical records, the patient's name and other identifying information could have been redacted and/or the medical records could have been produced under seal to protect patient privacy; however, the Agency never offered to produce any such document.

admits..." (*Id.*), the Court adopted the district court's erroneous conclusion that:

> Dr. Barth and Dr. Manning found "an alarming pattern that Dr. Hussain finds it appropriate to copy and paste other physicians [sic] assessment into electronic patient record without giving evidence that he has actually seen and examined the patient prior to, during, or after treatment. (Def's Ex. 4 at 5.)

App. 25. The Court further concluded that the Agency had established a non-discriminatory/non-retaliatory legitimate reason for Dr. Hussain's non-selection, stating: "Dr. Barth's July 2002 evaluation (approved by Dr. Fletcher) noted problems with Dr. Hussain's performance," and specifically cited "record-keeping," as one of these "reasons." There is absolutely no evidence in the record to support this serious allegation.

C. Dr. Hussain Produced the Required Medical Documentation to Obtain Sick Leave

Also on page 4 of its *Opposition*, the Agency alleges that Dr. Hussain produced "a doctor's note," stating that his emotional state required that he take leave from the stressful work environment." The Agency further claims that it requested additional medical documentation and that Dr. Hussain did not provide it; however, Dr. Hussain produced diagnoses and recommendations (not a "note") from *two* different treating physicians, both psychiatrists, that he take leave for work related stress. Hussain's *Opposition to Defendant's Motion for Summary Judgment*, Exhibits TT.

The Agency told Dr. Hussain that it would not grant him his earned, accumulated sick leave without additional documentation; however, the Agency gave Dr. Hussain absolutely no idea what type of additional documentation it required of him or his doctors. Even after years of litigation, the Agency has *never* provided the slightest guidance as to

what "additional documentation" Dr. Hussain could possibly have provided. The Agency has never cited any regulation, rule, provision of the union contract or any document indicating that anything more than a letter from the applicant's treating physician is necessary to take earned sick leave. The Agency never asked Dr. Hussain to submit to an Independent Medical Examination or diagnosis. Dr. Hussain could not produce anything more than he had produced.[7]

D. The Agency Misrepresents the Circumstances of Dr. Hussain's Motion to Enlarge Discovery

On page 5 of its *Opposition*, the Agency states that Dr. Hussain did not request an enlargement of discovery until "more than one month" after the Agency filed its *Motion for Summary Judgment.* The Agency has misrepresented the time line of events as well as the surrounding circumstances. The Agency filed its *Motion for Summary Judgment* on June 18, 2004 (Docket # 26), ten days late, after being granted two previous enlargements of time.[8] On July 8, 2004 – *16 days* after the Agency filed its *Motion for Summary Judgment* (not "more than a month," as the Agency alleges) -

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[7] The Agency has never suggested that Dr. Hussain should have provided his entire confidential medical file. Particularly since these medical records were records of psychotherapy, where the patient shared his most confidential secrets, such an invasion of privacy and the doctor-patient privilege would be intolerable.

[8] The original Scheduling Order, issued on October 27, 2003, set the close of discovery for March 27, 2004 and the date for dispositive motions as April 26, 2004. (Docket # 20) On April 14, 2004, the Defendant Agency moved to extend the deadline for its own dispositive motion to May 11, 2004 (Docket # 23). On May 7, 2004, the Agency filed a second motion for an enlargement, requesting that it be permitted to file its dispositive motion by June 8, 2004 (Docket # 24) On June 4, 2004, the Agency filed a third motion for an enlargement of time until June 18, 2004 (Docket # 25). The Court never ruled on the motion, but the Agency filed on June 18, 2004, without apology, explanation or penalty.

- the undersigned, Ms. Martin, entered her *Notice of Appearance*, as co-counsel with then lead counsel, Tony Shaw (now deceased).

> Plaintiff's counsel of record, Mr. Shaw, has informed the undersigned and Dr. Hussain that he has also obtained consent of opposing counsel to extend discovery, and intends to file a motion for an enlargement of discovery, based on this consent. Indeed, since the Agency did not even file an Answer to the November 6, 2003 Second Amended Complaint until June 24, 2004; certainly, Dr. Hussain could not be expected to depose witnesses or otherwise adequately conduct discovery without even the benefit of an Answer to the *Second Amended Complaint*.

On the same day, Agency counsel filed a *Response* to the undersigned's *Notice of Appearance*, denying that she and Mr. Shaw ever had any agreement to extend discovery and even denied that she and Mr. Shaw ever discussed the matter. In light of Ms. Abel's denial of Mr. Shaw's claims and a conference call with Judge Huvelle setting a hearing on the issue, the undersigned filed a formal *Motion to Enlarge Discovery*, on July 10, 2006, relying on both on Rules 14.4(b) (discussed on pages 2-4 of the motion) and 56(f) (page 4-9, particularly page 7).

As Judge Rogers stated in her concurring opinion, the client should not suffer for the negligence of his or her lawyer if the lawyer "misled the client by reassuring him that the litigation was continuing smoothly when in fact it was suffering severely from lack of attention." *Jackson v. Washington Monthly Co., 186 U.S. App. D.C. 288, 569 F.2d 119, 122 (D.C. Cir. 1977).* (App. 15) Judge Rogers erroneously assumed that Mr. Shaw did *not* mislead Dr. Hussain into believing that the case was progressing properly. Judge Rogers relied on this misplaced assumption

to conclude that Dr. Hussain should therefore bear the burden of forfeiting discovery due to Mr. Shaw's negligence (*Id.*); however, the record is clear that Mr. Shaw represented to both the client – and even to the new attorney entering the case – that the case was proceeding properly and that the attorneys had agreed to enlarge discovery in light of the Agency's enlargements of time to file an Answer to the Second Amended Complaint.[9]

Applying *Jackson v. Washington Monthly Co.* and the reasoning in Judge Rogers' concurrence to the facts of this case, Dr. Hussain should not be denied discovery due to Mr. Shaw's failure to file a formal motion to enlarge discovery.

CONCLUSION

Dr. Hussain respectfully requests that this Court grant *certiorari*.

Respectfully submitted,

Dawn V. Martin, Esquire
D.C. Federal Bar No. 412384
Law Offices of Dawn V. Martin
1725 I Street, N.W., Suite 300
Washington, D.C. 20006
(202) 408-7040 telephone
Counsel for Petitioner

[9] Mr. Shaw did present evidence that he had such an agreement with Ms. Abel.